Supreme Court, U.S.
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No. 00-717

Supreme Court of the United States

LESLY JEAN,

Petitioner,

v.

DELMA COLLINS, Chief of Detectives of the City of Jacksonville, Individually;
JAMES SHINGLETON, Police Officer with the City of Jacksonville, North Carolina, Police Department, Individually,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Appendix to Petition for Writ of Certiorari

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PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LESLY JEAN,
Plaintiff-Appellant,

v.

No. 95-7694

DELMA COLLINS, Chief of Detectives of the City of Jacksonville, Individually;
JAMES SHINGLETON, Police Officer with the City of Jacksonville, North Carolina, Police Department, Individually,
Defendants-Appellees.

On Remand from the United States Supreme Court.
(S. Ct. No. 98-980)

Argued: October 25, 1999
Decided: July 31, 2000
Entered: July 31, 2000

Before WILKINSON, Chief Judge, WIDENER, MURNAGHAN, WILKINS, NIEMEYER, LUTTIG, WILLIAMS, MICHAEL, MOTZ, TRAXLER, and KING, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by published per curiam opinion. Chief Judge Wilkinson wrote an opinion concurring in the judgment, in which Judge Widener, Judge Wilkins, Judge Niemeyer, Judge Williams, and Judge Traxler joined. Judge Murnaghan wrote a dissenting opinion, in which Judge Michael, Judge Motz, Judge King, and Senior Judge Hamilton joined. Judge Luttig wrote a dissenting opinion.

COUNSEL

ARGUED: Richard Brooks Glazier, BEAVER, HOLT, RICHARDSON, STERNLICHT, BURGE & GLAZIER, P.A., Fayetteville, North Carolina, for Appellant. Kenneth Ray Wooten, WARD and SMITH, P.A., New Bern, North Carolina, for Appellees. **ON BRIEF:** Rebecca J. Britton, BEAVER, HOLT, RICHARDSON, STERNLICHT, BURGE & GLAZIER, P.A., Fayetteville, North Carolina, for Appellant. John R. Green, Jr., WARD and SMITH, P.A., New Bern, North Carolina, for Appellees.

OPINION

PER CURIAM:

This case came to be argued before the en banc court on October 25, 1999. The judgment of the district court is hereby affirmed by an equally divided en banc court. Separate opinions follow seriatim.

AFFIRMED.

WILKINSON, Chief Judge, with whom Judges Widener, Wilkins, Niemeyer, Williams, and Traxler join, concurring in the judgment:

We concur in the court's judgment dismissing this case against North Carolina police officers Delma Collins and James Shingleton. Plaintiff Lesly Jean contends that Officers Collins and Shingleton violated his Fourteenth Amendment due process rights by failing to turn over exculpatory evidence to the prosecutor. Because plaintiff alleges at most a negligent miscommunication between these officers and the prosecutor, we would conclude that the officers have not deprived Jean of any Fourteenth Amendment right. As a result, we do not believe there can

be any § 1983 liability. For the facts of this case we would rely on our earlier en banc opinion. See Jean v. Collins, 155 F.3d 701, 703-05 (4th Cir. 1998) (en banc). In that case, we held that as of "1982, a reasonable police officer would not have known that his failure to turn over such evidence violated a criminal defendant's clearly established constitutional rights." Id. at 708. The Supreme Court then granted certiorari, vacated the judgment, and remanded to this court for further consideration in light of Wilson v. Layne, 526 U.S. 603 (1999). See Jean v. Collins, 526 U.S. 1142 (1999). It is in light of Wilson then that we address the question of when police officers are liable under § 1983 for allegedly withholding exculpatory evidence from the prosecution and by extension a criminal defendant.

I.

Wilson's directions are straightforward ones. "A court evaluating a claim of qualified immunity 'must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all . . . .'" Wilson, 526 U.S. at 609 (quoting Conn v. Gabbert, 526 U.S. 286, 290 (1999)); accord Siegert v. Gilley, 500 U.S. 226, 232 (1991). We must initially ask, therefore, if Jean has alleged a Fourteenth Amendment due process violation by Officers Collins and Shingleton.[1] Deciding this issue first can save a defendant from having "to engage in expensive and time consuming preparation to defend the suit on its merits."

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[1]In his dissenting opinion, our brother Murnaghan chides us for reinventing our theory of the case. This statement overlooks the fact that this case is here on remand from the Supreme Court in light of Wilson v. Layne. Wilson requires that this court address "whether the plaintiff has alleged the deprivation of an actual constitutional right at all." 526 U.S. at 609 (internal quotation marks omitted). It would be surprising if our court had not reviewed its earlier approach in light of Wilson's directive. Indeed, it would be irresponsible for us not to do so.

Siegert, 500 U.S. at 232. It "also promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public." Wilson, 526 U.S. at 609 (citing County of Sacramento v. Lewis, 523 U.S. 833, 841-42 n.5 (1998)).

In Jean v. Rice, 945 F.2d 82 (4th Cir. 1991), we held that Jean's due process rights had been violated. Specifically, we noted that "the government's failure [to turn over material impeachment evidence to the defense] was a violation of the principles announced in Brady and its progeny." Id. at 87. As a result of the prosecutor's Brady violation, Jean's request for a writ of habeas corpus was granted. See id. The question before us now is whether there was an additional constitutional violation in this case -- a due process violation by Officers Collins and Shingleton for withholding from the prosecutor the hypnosis recordings and reports.

The Supreme Court decisions establishing the Brady duty on the part of prosecutors do not address whether a police officer independently violates the Constitution by withholding from the prosecutor evidence acquired during the course of an investigation. See, e.g., Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972); United States v. Agurs, 427 U.S. 97 (1976); United States v. Bagley, 473 U.S. 667 (1985). Recent cases, including some from this circuit, have pointed toward such a duty. This court has noted that, "[a] police officer who withholds exculpatory information from the prosecutor can be liable under . . . section 1983," Goodwin v. Metts, 885 F.2d 157, 162 (4th Cir. 1989), but only where "the officer's failure to disclose the exculpatory information deprived the § 1983 plaintiffs of their right to a fair trial," Taylor v. Waters, 81 F.3d 429, 436 n.5 (4th Cir. 1996). And in Carter v. Burch, the court noted that a police officer's actions in failing to turn over materially exculpatory evidence to a prosecutor "violate[d] [the § 1983

plaintiff's] constitutional rights." 34 F.3d 257, 264 (4th Cir. 1994). Other circuits have also suggested that there may be a duty here. See Brady v. Dill, 187 F.3d 104, 114 (1st Cir. 1999); Walker v. City of New York, 974 F.2d 293, 298-99 (2d Cir. 1992); Geter v. Fortenberry, 849 F.2d 1550, 1559 (5th Cir. 1988); Sanders v. English, 950 F.2d 1152, 1162 (5th Cir. 1992); Jones v. City of Chicago, 856 F.2d 985, 993-96 (7th Cir. 1988); McMillian v. Johnson, 88 F.3d 1554, 1566-70 (11th Cir.), amended by 101 F.3d 1363 (11th Cir. 1996).

These cases have left unclear the exact nature of any duty that the law imposes on police with regard to exculpatory evidence. Several characteristics of this duty, however, seem evident. First, alleged failures to disclose do not implicate constitutional rights where no constitutional deprivation results therefrom. In this context, the constitutional deprivation must be defined as a deprivation of liberty without due process of law. In the absence of a cognizable injury, such as a wrongful criminal conviction, police suppression of evidence might still give rise to claims under state law. But unless the § 1983 plaintiff can point to a constitutional injury caused by the suppression, no § 1983 remedy will lie. See Albright v. Oliver, 510 U.S. 266, 270-71 n.4 (1994) (plurality opinion) (substantive due process cannot transform a state law malicious prosecution claim into a constitutional claim); id. at 281-86 (Kennedy, J., joined by Thomas, J., concurring in judgment) (same); Taylor, 81 F.3d at 436 & n.5 ("To the extent that Goodwin bases its holding on a conclusion that the officer's failure to disclose exculpatory evidence deprived the § 1983 plaintiffs of a liberty interest in avoiding prosecution on less than probable cause, that reasoning has been rejected in Albright.").

Second, to speak of the duty binding police officers as a Brady duty is simply incorrect. The Supreme Court has always defined the Brady duty as one that rests with the

prosecution. See, e.g., Brady, 373 U.S. at 87 ("suppression by the prosecution of evidence favorable to an accused upon request violates due process"); Giglio, 405 U.S. at 154 (satisfying Brady "is the responsibility of the prosecutor"); Moore v. Illinois, 408 U.S. 786, 794 (1972) ("The heart of the holding in Brady is the prosecution's suppression of evidence . . . ."); Agurs, 427 U.S. at 108 ("the prosecutor's constitutional duty to disclose"); Bagley, 473 U.S. at 676 ("the prosecutor failed to disclose evidence"); Kyles v. Whitley, 514 U.S. 419, 437 (1995) ("the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached").

The Brady duty is framed by the dictates of the adversary system and the prosecution's legal role therein. Legal terms of art define its bounds and limits. The prosecutor must ask such lawyer's questions as whether an item of evidence has "exculpatory" or "impeachment" value and whether such evidence is "material." It would be inappropriate to charge police with answering these same questions, for their job of gathering evidence is quite different from the prosecution's task of evaluating it. This is especially true because the prosecutor can view the evidence from the perspective of the case as a whole while police officers, who are often involved in only one portion of the case, may lack necessary context. To hold that the contours of the due process duty applicable to the police must be identical to those of the prosecutor's Brady duty would thus improperly mandate a one-size-fits-all regime.

Third, it would be impermissible to hold the police liable for due process violations under § 1983 where they have acted in good faith. In Daniels v. Williams, the Supreme Court stated "that the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or

property." 474 U.S. 327, 328 (1986). The Fourteenth Amendment mandates, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Daniels holds that, as a matter of plain constitutional text, no "deprivation" occurs on account of official negligence. 474 U.S. at 330-33. Indeed, negligent conduct cannot by definition establish the "affirmative abuse of power" necessary to constitute a due process deprivation. See id. at 330-32. Under Daniels, then, police officer negligence or inadvertence in failing to turn over evidence cannot be actionable under § 1983.

In an analogous case to the present, the Supreme Court refused to find that police officers violated the Due Process Clause in the absence of evidence that they acted in bad faith. In Arizona v. Youngblood the Court addressed that area of the law that "might loosely be called . . . constitutionally guaranteed access to evidence." 488 U.S. 51, 55 (1988) (internal quotation marks omitted). Youngblood involved police who failed to refrigerate clothing which contained semen stains and to perform tests on other semen samples. Id. at 53-55, 58. The defendant argued that properly preserved evidence might well have shown that he was innocent of any sexual assault. The Youngblood Court held, however, that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." Id. at 58.

While Youngblood dealt with the failure to preserve evidence, its principles are certainly applicable to the present situation. Here, as in Youngblood, the prosecutor and ultimately the defense allegedly failed to receive exculpatory evidence from the police. Here, as in Youngblood, the police officers' actions were alleged to constitute a due process violation. The Youngblood Court stressed its "unwillingness" to read the Due Process Clause

to impose "on the police an undifferentiated and absolute duty" in that context. Id.

We similarly decline to impose a sweeping duty on police in the instant situation and note the obvious drawbacks of doing so.[2] For instance, such a duty would widen the legal gulf between prosecutors and police to such an extent as to make scapegoats of police for every item of evidence discovered post-trial. Prosecutors plainly enjoy absolute immunity in the exercise of their prosecutorial duties, of which the disclosure of Brady material to the defense is clearly one.

See Kalina v. Fletcher, 522 U.S. 118, 123-29 (1997); Burns v. Reed, 500 U.S. 478, 486 (1991); Imbler v. Pachtman, 424 U.S. 409, 413-16, 430-31 (1976). To confer on prosecutors absolute immunity while denying to police the right to argue even bona fides would multiply exponentially litigation against even conscientious officers.

Further, the law has already placed ultimate responsibility upon the prosecutor for disclosing Brady material to the defense. When Brady violations occur, criminal defendants may have their convictions overturned. Because police knowledge is plainly imputed to the prosecution for purposes of the prosecutor's Brady duties, see Kyles v. Whitley, 514 U.S. 419, 437-38 (1995), the prosecutor bears the responsibility for implementing procedures designed to ensure that police officers turn over

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[2]Our brother Murnaghan's dissent has a fundamental problem: it conflates the standards of a Brady violation with the standards of a § 1983 claim. The problem with this line of argument is simply that the Supreme Court does not accept it. Indeed, the dissent's frustration on remand owes to the fact that it runs headlong into the Supreme Court's decisions in Daniels and Youngblood. Despite its strenuous efforts, the dissent has failed to circumnavigate or otherwise explain away these two highly pertinent precedents. See, e.g., Post at 23 ("Daniels is a difficult case because the Court, along with judicial commentators, often describe the opinion as having 'overruled' Parratt.").

all evidence to him, see Giglio, 405 U.S. at 154. To hold officers responsible under § 1983 for internal miscommunications that Kyles and Giglio charge the prosecution with preventing is to have § 1983 suits and Brady doctrine heading in diametrically opposed directions. Moreover, the § 1983 suit could well set up a continual exercise in finger-pointing between prosecutors and police over whose fault it was that the evidence never reached the defendant. Making internal communications between prosecutors and police the customary subject of § 1983 litigation would thrust the federal courts deep into the operations of state prosecutors' offices, a breach of federalism principles for which the Due Process Clause of the Constitution provides no warrant.

This danger is plainly illustrated by this action. The prosecutor in Jean's case, Walter Vatcher, made clear via two affidavits that Officers Collins and Shingleton had indeed disclosed substantial amounts of information to him with regard to the hypnoses. Vatcher stated that the officers had "informed [him] of the existence of the hypnoses and identification procedures" used in the Jean investigation. Vatcher was further informed that "there were some changes in [Shingleton's] description after hypnosis," specifically "that under hypnosis [Shingleton] no longer recalled any facial hair and his description of the [suspect's] shirt may have changed somewhat." Vatcher also reported that the two officers had told him of the hypnosis information months before trial and that he received "complete updates on the investigation, including facts concerning the identification procedures used." Vatcher, in fact, commended Officers Shingleton and Collins for turning over "all [of the] evidence that [he] requested from them."There is even substantial evidence via affidavits from Smith, Collins, Shingleton, and Wilson that Vatcher had been told of the existence of the hypnosis recordings and reports. Vatcher, however, stated in one of his affidavits

that he did not "recall being made aware of recordings and written records."

The difficulty of trying to sort out such everyday communications between prosecutor and police underscores the need to insist at a minimum that an actual bad faith deprivation of due process rights be alleged. The conduct of Shingleton and Collins lies well below this threshold. While Jean contends that the officers acted in a "willful, wanton and reckless manner," conclusory allegations will not suffice. See, e.g., Suarez Corp. Indus. v. McGraw, 202 F.3d 676, 684-91 (4th Cir. 2000); Hartley v. Parnell, 193 F.3d 1263, 1268 (11th Cir. 1999); Wilkinson v. Russell, 182 F.3d 89, 105-06 (2d Cir. 1999); Torres v. United States, 200 F.3d 179, 186 (3d Cir. 1999). Jean simply is unable to provide evidence of a bad faith deprivation carried out by Collins and Shingleton - - a matter on which the burden plainly rests with the plaintiff.[3] For example, Jean does not claim that Collins and Shingleton destroyed or otherwise failed to preserve the evidence that is now at issue - - a fact which alone tends to negate any inference of

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[3]In many instances the first prong of Wilson v. Layne can be resolved on the pleadings alone. However, that makes little sense where a voluminous record is before us. Circuit courts, including this one, have not hesitated after Wilson to address the record in determining whether plaintiff has alleged a violation of a constitutional right. See, e.g., Suarez Corp. Indus. v. McGraw, 202 F.3d 676, 684-91 & n.18 (4th Cir. 2000) ("Thus, SCI's claim . . . is undermined by the evidence in the record."); Hartley v. Parnell, 193 F.3d 1263, 1269 n.2 (11th Cir. 1999) ("We note that . . . there is no evidence in the record . . . ."); Wilkinson v. Russell, 182 F.3d 89, 105 (2d Cir. 1999) ("The record reveals another key source of information supporting defendants' decision . . . ."). Indeed, the concern expressed in Siegert that defendants not be put through unnecessary discovery would be vitiated if we failed to take account of the ample record that has already been assembled in this case. 500 U.S. at 231. It would simply impose an unnecessary burden on defendants to move beyond Wilson's first prong when the record before us conclusively points to the absence of any constitutional deprivation.

bad faith. And while Jean again claims in conclusory fashion that the hypnosis recordings and reports were "patently exculpatory," he does not point to any evidence showing that the officers actually knew of the significance of these items. Moreover, Jean conceded both in his brief and at oral argument that Vatcher at the very least was made aware of the existence of the two hypnoses. In sum, Jean points to nothing that resembles the kind of affirmative misuse of power that the Supreme Court has indicated would implicate due process protections.[4]

Because there was no threshold bad faith deprivation, the precise contours of any duty on the police in situations such as these is something we need not explore

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[4]Our brother Luttig contends in dissent that "Jean has never even had the cause, much less the opportunity, to develop a record with regard to Collins' and Shingleton's state of mind in withholding the evidence." Post at 38. This assertion, however, is belied by the record itself. With respect to cause, the dissent apparently overlooks that Jean claimed bad faith in his complaint. By doing so, Jean himself indicated that the officers' state of mind was relevant to the success of his suit. Indeed, since the very first day that Jean was arrested, it has always been to his advantage to place the conduct of the police in the worst possible light. And Jean has enjoyed ample opportunity to uncover the existence of officer bad faith. Over seventeen years have now transpired since the time of Jean's arrest and trial. During that time, Jean has been allowed extensive discovery. During his habeas case, Jean deposed both Officer Collins and Officer Shingleton. When the officers moved for summary judgment in the instant proceedings, Collins and Shingleton submitted affidavits in which they specifically rejected Jean's contention that they acted in bad faith. Jean responded by submitting more than 650 pages of, inter alia, affidavits, exhibits, deposition transcripts, hypnosis transcripts, hypnosis worksheets, police reports, and police notes. Yet, as our brother Luttig correctly points out, the record as to officer bad faith is entirely undeveloped." Post at 38. The reason for this is not that Jean has lacked cause and opportunity to uncover such evidence, for he has had no shortage of either. Rather, it is because his seventeen-year search and voluminous submissions have uncovered nothing that raises a triable issue of fact on this point.

in detail.[5] Several points, however, are clear. A Brady violation that resulted in the overturning of the § 1983 plaintiff's conviction is a necessary, but not a sufficient, condition for § 1983 liability on the part of the police. It is a necessary condition because the Brady violation establishes the requisite threshold of constitutional injury (a conviction resulting in loss of liberty) below which no § 1983 action can lie. It is not a sufficient condition, however, because the Brady duty is a no fault duty and the concept of constitutional deprivation articulated in both Daniels and Youngblood requires that the officer have intentionally withheld the evidence for the purpose of depriving the plaintiff of the use of that evidence during his criminal trial. This is what is meant by "bad faith." And that must be established on the basis of evidence, including among other things the nature of the withheld material, that would negate any negligent or innocent explanation for the actions on the part of the police. Of course the bad faith manipulation of evidence on the part of the police cannot be countenanced. Constitutional absolution for the concealment, doctoring, or destruction of evidence would fail to protect the innocent, fail to assist the apprehension of the guilty, and fail to safeguard the judicial process as one ultimately committed to the ascertainment of truth. But what occurred here was at worst a negligent miscommunication among Vatcher, Collins, and Shingleton - - an incident for which Vatcher under Brady, Giglio, and Kyles bears ultimate responsibility. Any decision on Vatcher's part not to request additional hypnosis information cannot possibly be recast seventeen years later

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[5]We also do not address what sort of immunities the officers might claim if a constitutional violation had been properly alleged against them. Immunities appear by way of defense. And Wilson v. Layne makes clear that we need not proceed to address the immunity issue if no constitutional violation has been alleged. 526 U.S. at 609.

as a bad faith constitutional deprivation perpetrated by these officer defendants.

II.

As Jean has failed to allege a constitutional violation on the part of Collins and Shingleton, we would affirm the judgment.

MURNAGHAN, Circuit Judge, with whom Circuit Judges MICHAEL, MOTZ, and KING, and Senior Circuit Judge HAMILTON join, dissenting:

The fate of Lesly Jean's § 1983 action is lamentable, though scarcely surprising. What is surprising is the tenuous methodology the concurrence employs to extinguish his civil rights action. In recent years, the Supreme Court has undeniably restricted the availability of § 1983, particularly as a mode of redressing due process violations. Nonetheless, the Court still recognizes some situations, however circumscribed, where § 1983 damages remain viable.

The concurrence's analysis of Jean's § 1983 claim reflects a fundamental misunderstanding of the Supreme Court's jurisprudence in this area. While the opinion is rhetorically consonant with the Court's skepticism about civil rights litigation, it is substantively at odds with the Court's caselaw on § 1983 and with accepted understandings of the Due Process Clause. Accordingly, I dissent.

I.

From the outset, I have been of the view that Brady v. Maryland, 373 U.S. 83 (1963), controls the analysis of Jean's civil rights claim. It is true that Brady involved

suppression of evidence by a prosecutor, whereas Jean's claim alleges suppression of evidence by police officers. However, the post-Brady case of Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842 (4th Cir. 1964), clarified that the State's disclosure obligation applies to police officers as well as prosecutors:

> [I]t makes no difference if the withholding [of exculpatory evidence] is by officials other than the prosecutor. The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure. If the police allow the State's Attorney to produce evidence pointing to guilt without informing him of other evidence in their possession which contradicts this inference, [police] officers are practicing deception not only on the State's Attorney but on the court and the defendant.

Id. at 846 (emphasis added) (footnote omitted).

As these lines from Barbee suggest, the Brady disclosure regime is about getting exculpatory evidence into the hands of the defendant, not about disaggregating the State's prosecutorial team into discrete sub-groups and having a defendant's constitutional rights turn on such rigid formalisms. This is why Brady's compulsory disclosure requirement applies to all officials working in furtherance of the State's prosecution.

Of course, the manner in which prosecutors and police officers comply with Brady is different, reflecting their different functions in the criminal justice system. Police officers do not disclose evidence to criminal defendants directly. Instead, the police accumulate evidence

and then ministerially deliver it to the prosecutor. The prosecutor then makes a discretionary legal judgment about whether the evidence is material and exculpatory, such that Brady compels its disclosure to the defendant. This functional differentiation, however, should not obscure the fact that Brady creates a singular constitutional duty, which prosecutors and police officers are capable of breaching in factually different ways.

II.

The concurrence does not seriously dispute that a Brady violation occurred. Instead, the dispute is whether Jean can redress this Brady violation in a § 1983 damages action against Officers Collins and Shingleton.

Section 1983 is not a repository of substantive rights but is simply a remedial mechanism for vindicating rights with independent constitutional foundations. See Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979) (holding that § 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred").

The constitutional right in the instant case could not be any clearer. In Jean v. Rice, 945 F.2d 82 (4th Cir. 1991), we held that the State of North Carolina violated Jean's due process rights, as recognized in Brady, when Officers Collins and Shingleton withheld hypnosis-related evidence from the prosecutor - - evidence that could have assisted Jean in impeaching the credibility of key government witnesses. See id. at 87. Because we have already established that a Brady violation occurred, there is a core constitutional offense that forms the basis for a § 1983 action. The availability of § 1983 as a remedial measure would seem to follow inexorably from the very fact of the underlying Brady violation.

Not so to the concurrence. In order to block what it regards as a frivolous lawsuit, the concurrence has labored

assiduously to divorce Jean's § 1983 action from the underlying Brady violation that engendered it. See ante at 3 ("In Jean v. Rice . . . we held that Jean's due process [Brady] rights had been violated. . . . The question before us now is whether there was an additional constitutional violation in this case - - a due process violation by Officers Collins and Shingleton for withholding from the prosecutor the hypnosis recordings and reports.") (emphasis added). The challenge for the concurrence has been coming up with a way to say two seemingly contradictory things: that while Jean's Brady rights were clearly violated, entitling him to reversal of his conviction, Jean can not vindicate his Brady rights against Collins and Shingleton in a separate § 1983 damages action.

A.

Since the inception of this case, the concurrence has had considerable difficulty explaining its way out of this paradox. In our first en banc opinion dealing with Jean's case, the majority relied on qualified immunity to shut down Jean's § 1983 action.[1] The majority began by holding that the obligation of police officers to disclose exculpatory evidence to prosecutors was now a matter of settled law. See Jean v. Collins, 155 F.3d 701, 710 n.3 (4th Cir. 1998) ("More recently this circuit has recognized that the failure of police officers to turn over evidence to a prosecutor may violate a criminal defendant's constitutional right to receive such evidence.") (citing Taylor v. Waters, 81 F.3d 429,

[1]Because the first en banc hearing produced a majority, rather than an evenly divided panel, I use the term "majority" rather than "concurrence" when referring to the first en banc opinion. Despite the difference in nomenclature, both the first en banc "majority" opinion and the second en banc "concurring" opinion were written by the same author. That is why I emphasize the discontinuities between the two opinions.

436 n.5 (4th Cir. 1996); Carter v. Burch, 34 F.3d 257, 264 (4th Cir. 1994); and Goodwin v. Metts, 885 F.2d 157, 162-63 (4th Cir. 1989)); see also id. ("[T]he decisions in Taylor, Carter, and Goodwin now provide notice to police officers that they can be subject to monetary damages under section 1983 for failure to disclose exculpatory evidence to the prosecutor.").

While well-settled today, the first en banc majority found that the "police to prosecutor" disclosure obligation was not clearly established in 1982 when Collins and Shingleton withheld the hypnosis evidence. The majority distinguished Brady - - a pre-1982 case that seemed to establish the applicable disclosure requirements - - by holding that it only imposed a disclosure obligation on the State generically. The disclosure duty's specific application to police officers, according to the majority, was a post-1982 doctrinal development. See Jean, 155 F.3d at 710 n.3. Thus, the officers were entitled to a defense of qualified immunity.

B.

The Supreme Court's remand, which instructed us to reconsider Jean's case in light of Wilson v. Layne, 526 U.S. 603 (1999), gave the majority a chance to revisit its first en banc opinion. Wilson held that a court considering a defense of qualified immunity should first ask whether the disputed state action would violate present-day constitutional law, before reaching the backward looking question of whether the illegality of the state conduct was "clearly established" at the time it occurred. See id. at 609.

Pursuant to Wilson's directive, the majority (reconstituted as a "concurrence") now asks whether the failure of police officers to deliver exculpatory evidence to prosecutors would violate due process guarantees under

year 2000 jurisprudence. See ante at 4-5. In its first en banc opinion, the majority held that the police-specific disclosure obligation was clearly established today, just not when Collins and Shingleton withheld the hypnosis evidence in 1982. Repudiating the position the majority took in the first en banc opinion, the concurrence now answers this question differently, holding that police officers have no independent duty (at least no independent Brady duty) under year 2000 due process principles to disclose exculpatory evidence to prosecutors. See ante at 4-5.

The concurrence defends this Janus-faced maneuver by seeking refuge in the Supreme Court's directive to revisit Jean's case in light of Wilson. See ante at 3 n.1 ("It would be surprising if the court had not reviewed its earlier approach in light of Wilson's directive. Indeed, it would be irresponsible for us not to do so."). This appeal to Wilson, however, is unavailing. All Wilson said was: "Answer the year 2000 question first," not "Answer the year 2000 question differently."

The real explanation for the concurrence's vacillation has to do with post hoc misgivings about the impact of its first en banc opinion. Dismissing Jean's case on a qualified immunity rationale got rid of one irksome civil rights plaintiff; but by recognizing a police-specific disclosure obligation under year 2000 law, the concurrence unwittingly opened the flood gates, inviting future criminal defendants to extort money damages from "cops on the beat" every time a problem with exculpatory evidence arises. In order to seal the rupture its first en banc opinion created, the concurrence now holds that police officers who withhold exculpatory evidence from prosecutors are not independently liable for Brady violations, even under year 2000 jurisprudence. Thus, under the concurrence's new formulation, Brady can never furnish the doctrinal basis for a § 1983 action against police officers who fail to disclose exculpatory evidence. This was true in 1982, when Collins

and Shingleton withheld evidence from Lesly Jean (see en banc #1) and it remains true today (see en banc #2).

III.

The concurrence has several theories about why criminal defendants who are the victims of police non-disclosure may not rely on Brady to generate § 1983 actions against the offending police officers. The theories fall roughly into two categories. The first group relies on restrictive interpretations of Brady and the substantive constitutional rights it creates. The second group relies on a restrictive interpretation of § 1983 by grafting heightened culpability requirements onto the § 1983 apparatus. These culpability requirements exceed what is required to prove a violation of the underlying constitutional right; but according to the concurrence, they must be established in order to trigger the heavy remedial machinery of a § 1983 damages action.

A.

The first way the concurrence deflects Jean's § 1983 claim is by manipulating the substantive basis of his claim: the right to exculpatory evidence established in Brady. The concurrence frames Jean's Brady claim in police-specific terms, as premised on the failure of police officers to disclose exculpatory evidence to prosecutors. See ante at 4. The concurrence then describes the Brady duty in such a restrictive way that police officers (and thus Jean's claim) fall outside its ambit. See ante at 5.

The concurrence produces this perverse result by articulating the State's Brady duty in prosecution-specific terms. This narrow construction of Brady derives from the concurrence's adherence to an elaborate legal fiction called the "imputed to" theory. See ante at 7-8. Under this

theory, police officers are indirectly subject to Brady, in the sense that they are expected to furnish prosecutors with evidence they accumulate. Police officers, however, are not directly subject to Brady because the disclosure duty it creates is ultimately the prosecutor's responsibility. Thus, when police officers fail to disclose exculpatory evidence, Brady "imputes" these non-disclosures to the prosecution for purposes of assessing the State's overall compliance with Brady.

Because the prosecution is charged with "constructive" knowledge of all evidence in the possession of its sub-agents, failure of the police to hand over exculpatory evidence can imperil the integrity of the State's prosecution, often leading to reversal of criminal convictions (as happened in the instant case). Non-disclosures, however, cannot subject the police to civil liability because the police have no independent duty to criminal defendants under Brady, requiring them to supply the prosecutor with exculpatory evidence. Instead, the State's Brady obligation to criminal defendants is discharged through the instrumentality of the prosecutor.

At its simplest level, the concurrence's "imputed to" theory is an attempt to shift blame for the Brady violation in this case onto the prosecutor (Mr. Vatcher), who conveniently enjoys absolute immunity from damages actions. See Imbler v. Pachtman, 424 U.S. 409, 424-27, 431 n.33 (1976).

The concurrence also attempts to buttress the "imputed to" theory by resting it on more principled foundations - - some precedential, some policy-based. Neither precedent nor policy, however, support this attempt to circumscribe the State's Brady duty.

1.

First, the concurrence claims to derive the "imputed to" theory from the language of Brady itself, along with the language of several post-Brady opinions, which describe the State's disclosure duty in prosecution-specific terms. See Brady, 373 U.S. at 87 ("[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process . . . ."); Moore v. Illinois, 408 U.S. 786, 794 (1972) ("The heart of the holding in Brady is the prosecution's suppression of evidence . . . ."); United States v. Agurs, 427 U.S. 97, 108 (1976) (referring to "the prosecutor's constitutional duty to disclose").

Conspicuously absent from the concurrence's discussion, however, is the important post-Brady case of Barbee, which dispelled the notion that the police are exempt from the Brady disclosure duty. In Barbee, police officers failed to disclose exculpatory ballistics and fingerprint tests that tended to show a revolver other than the defendant's was responsible for the crime in question. See Barbee, 331 F.2d at 844. We found that the ballistics and fingerprints tests were indeed exculpatory because they undermined the testimony of several witnesses who had identified the defendant's revolver as the weapon used in the shooting. Thus, we held that the police should have disclosed the exculpatory evidence and issued a writ of habeas corpus. See id. at 847.

In defending the non-disclosure, the State of Maryland argued that there was no constitutional infirmity because the duty of disclosure fell on the prosecution, not the police. See id. at 844. Because the prosecution had no knowledge that the police were in possession of the exculpatory evidence, the State argued that no Brady violation had occurred. See id. We rejected this formalistic distinction, holding that when "the police allow the State's Attorney to produce evidence pointing to guilt without

informing him of other evidence in their possession which contradicts this inference, [police] officers are practicing deception not only on the State's Attorney but on the court and the defendant." Id. at 846 (emphasis added) (footnote omitted).

It is difficult to reconcile the concurrence's "imputed to" theory with Barbee's plain statement that the police misconduct practiced a deception "not only" on the prosecutor, but on the court "and the defendant." Of course, the police officer's duty is to disclose to the prosecution rather than to the defendant directly; but according to Barbee, the constitutional injury arising from an officer's non-disclosure runs directly from the police to the defendant, unmediated by the prosecutor. See id. ("Failure of the police to reveal . . . material evidence in their possession [to the prosecution] is equally harmful to a defendant whether the information is purposefully, or negligently, withheld.") The factual interposition of the prosecutor between the police and the defendant does not transform the prosecutor into a supervening legal cause of the constitutional injury.

The Supreme Court confronted a similar issue years later in Kyles v. Whitley, 514 U.S. 419 (1995). There, the State of Louisiana made the same argument the State of Maryland made in Barbee: namely, that the State should not be held accountable under Brady for evidence known only to police investigators and not to the prosecutor. See id. at 438. In language echoing Barbee, the Court criticized the State's attempt to draw a formalistic dichotomy between police and prosecutors and rejected the State's "argument for excusing a prosecutor from disclosing what he does not happen to know." Id. The State's disclosure obligation under Brady applies even when the prosecutor is completely in the dark, the Court held, because the ultimate injury to the defendant is the same, regardless of whether the police or the prosecutor is to blame. Thus, like Barbee, the Kyles

opinion made clear that the goal of Brady was getting exculpatory evidence to the defendant, not creating an analytical patchwork of legally distinct disclosure duties for every sub-group working in furtherance of the State's criminal prosecution.

Some of the language in Kyles did suggest that, as a practical matter, the prosecutor's office is the fulcrum of the Brady disclosure obligation. See id. at 437 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."). The insight here, however, was pragmatic rather than doctrinal. Because Kyles involved a habeas petition rather than a § 1983 damages action, the Court was obviously more concerned with the pragmatic question of how to keep the State from evading its Brady obligation than it was with the legal question of how to carve up the State's investigative-prosecutorial team, either as an abstract doctrinal exercise or for purposes of allocating distinct spheres of civil liability. Thus, the fact that Kyles made the prosecutor vicariously responsible when police officers fail to disclose exculpatory evidence does not mean that Kyles also placed police officers beyond constitutional reproach for their personal role in subverting the State's Brady duty.

2.

The concurrence also advances a policy argument in support of its "imputed to" theory. See ante at 7-8. The concurrence argues that only prosecutors are trained to make the nuanced and quintessentially legal judgment of whether a piece of evidence is truly exculpatory, such that disclosure to the defendant is constitutionally compelled. Because police officers are unfamiliar with the "[l]egal terms of art," ante at 5, necessary to make this complex determination, it would be unfair to hold them monetarily

liable when they blunder. On this view, the "imputed to" theory, which places ultimate constitutional responsibility for exculpatory evidence problems in the hands of the prosecutor, is merely a recognition of the prosecutor's special institutional competence - - and of the unfairness involved in asking a police officer to pay money damages for mistakes he was not trained to avoid.

This observation is a strawman that confuses the crucial issue. It presupposes that when a police officer discloses evidence to a prosecutor, the act is functionally identical to the discretionary legal judgment prosecutors make when disclosing evidence directly to criminal defendants. In reality, the two acts are incommensurable. Requiring police officers to disclose evidence to prosecutors does not require technical legal expertise because the act is essentially ministerial, not discretionary. The police officer's duty is not to determine whether the evidence is material and exculpatory. His duty is simply to collect the evidence and to disclose all of it to the prosecutor, who then makes the discretionary legal judgment about its material, exculpatory attributes. Thus, there is no reason to "impute" the misconduct of police officers to prosecutors when police officers are perfectly capable of understanding their ministerial function and still choose to disregard it - - not out of ignorance but out of dereliction.

B.

By cabining Brady so that the duty it creates applies only to prosecutors, the "imputed to" theory helps the concurrence extinguish Jean's § 1983 claim. It does so by eroding the constitutional theory on which his § 1983 claim is based: the theory that police officers independently violate Brady when they withhold evidence from prosecutors.

The concurrence also attacks Jean's § 1983 action from another angle. The strategy behind the "imputed to" theory was to cripple Jean's § 1983 claim by eroding its underlying constitutional foundation. The concurrence's second strategy is to target the § 1983 remedial apparatus itself: specifically, by creating heightened culpability requirements that plaintiffs must meet in order to convert constitutional injuries they have suffered into the basis for money damages.

The concurrence resorts to this second strategy, rather than resting on the "imputed to" theory, in order to resolve a doctrinal problem created by the "bad faith" requirement the concurrence inartfully derives from Daniels v. Williams, 474 U.S. 327 (1986), and Arizona v. Youngblood, 488 U.S. 51 (1988). According to the concurrence, citizens who allege violations of the Due Process Clause must make a threshold showing that the due process violation occurred in a culpable, "bad faith" manner. Because Jean failed to prove that Collins and Shingleton withheld the hypnosis evidence with the requisite degree of culpability, the concurrence holds that Jean's claim fails on that ground alone. See ante at 6-8.

The problem with the concurrence's "bad faith" thesis, however, is that Brady makes the non-disclosure of exculpatory evidence a violation of the Due Process Clause "irrespective of the good faith or bad faith" of the non-disclosing official. Brady, 373 U.S. at 87; see also Barbee, 331 F.2d at 846 ("If the police silence as to the existence of the [exculpatory] reports resulted from negligence rather than guile, the deception is no less damaging."). The concurrence is therefore placed in the untenable position of having to reconcile this language with the central proposition of its opinion: that only "bad faith" failures to withhold exculpatory evidence violate due process.

Much of the concurrence's opinion is a misguided search for the theory that explains why "bad faith" is not

required to prove due process violations under Brady, but is required for every other due process violation - - including the due process claim Jean has brought against Collins and Shingleton (which apparently rests on some other strand of due process jurisprudence, independent of Brady, that the majority never fully specifies).

1.

Rather than working with the limits of the caselaw, the concurrence invents a theory out of whole cloth. According to the concurrence, the "bad faith" requirement does not apply to all due process cases. Nor does it apply to every § 1983 action. It only applies to that subset of cases that involve both § 1983 and the Due Process Clause - - that is, where criminal defendants are dissatisfied with the conventional due process remedy of a new trial and turn to § 1983 as a supplemental remedial mechanism. When criminal defendants seek nothing more than a new trial to redress a due process infirmity, Brady's "no fault" principles apply, and the defendant gets a new trial regardless of the good faith or bad faith manner in which the due process violation occurred. When criminal defendants seek money damages under § 1983, however, the "fault-based" doctrines articulated in Daniels and Youngblood apply. Unless the due process violation occurred in a culpable, "bad faith" manner, no damages remedy will lie. See ante at 9.

Thus, what the concurrence contemplates is a two-tiered regime, with one set of "no fault" standards for proving garden-variety violations of the Due Process Clause and a heightened, more stringent set of "fault-based" standards for redressing those same due process violations in § 1983 damages actions. In so holding, the concurrence invents a new theory of civil rights litigation that departs

from established understandings of § 1983 and the Due Process Clause.

2.

The Supreme Court has rejected the concurrence's two-tiered formulation in Parratt v. Taylor, 451 U.S. 527 (1981). There, the Court held unequivocally that § 1983 does not create a heightened culpability requirement above and beyond the culpability required to establish a violation of the underlying constitutional right. See id. at 534 ("Nothing in the language of § 1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights."); see also id. ("Section 1983, unlike its criminal counterpart, 18 U.S.C. § 242, has never been found by this Court to contain a state-of-mind requirement.").

The concurrence presumably thinks that Parratt is inapposite because the concurrence believes (falsely) that it has derived the heightened culpability requirement from the Due Process Clause, as interpreted in Daniels and Youngblood, rather than from § 1983 itself. On this theory, all Parratt forecloses is the grafting of a scienter requirement onto the whole § 1983 apparatus; but if the scienter requirement comes from the underlying constitutional right (here, the Due Process Clause), there is no Parratt problem.

There are two responses to this specious argument. One is that the concurrence's two-tiered formulation, while ostensibly derived from the Due Process Clause, still violates Parratt because its effect is to endow § 1983 with a heightened scienter requirement. Reading a culpability requirement into the Due Process Clause and then applying it only to due process claims brought under § 1983 is an end run around Parratt. Such differential treatment of "ordinary" constitutional claims, on one hand, and "§

1983" constitutional claims, on the other hand, is the very thing that Parratt prohibits.

The second, and more important, response is that the two-tiered formulation the concurrence purports to derive from the Due Process Clause has no credible foundation in due process jurisprudence. The concurrence has simply misunderstood the two due process cases on which it relies: Daniels and Youngblood.

3.

Daniels is a difficult case because the Court, along with judicial commentators, often describe the opinion as having "overruled" Parratt. This is only true in part, however. Parratt is a case with two separate, but easily confused, holdings. One holding was reaffirmed by Daniels; the other holding Daniels overruled.

Parratt dealt with a § 1983 action where the underlying constitutional claim involved a violation of the Due Process Clause. Parratt first addressed the question of whether § 1983 itself imposed a threshold scienter requirement on every constitutional claim brought under its auspices. The Court framed the inquiry as "whether mere negligence will support a claim for relief under § 1983." See Parratt, 451 U.S. at 532.

The Court began by quoting the language of § 1983, which speaks of creating a damages remedy for "deprivations" of constitutional rights effected under color of state law. See 42 U.S.C. § 1983. The question in Parratt was whether "deprivation" in this context connoted a heightened state-of-mind requirement, based on the theory that § 1983 damages remedies should be reserved for only the most egregious, willful constitutional violations. The Court said "No." See Parratt, 451 U.S. at 534 ("Nothing in the language of § 1983 . . . limits the statute solely to intentional deprivations of constitutional rights"); see also

id. at 535 ("[Section] 1983 affords a civil remedy for deprivations of federally protected rights . . . without any express requirement of a particular state of mind.") (emphasis added).

Having decided that § 1983 contains no scienter requirement, the Parratt court went to the underlying constitutional claim the plaintiff had asserted (a violation of the Due Process Clause) and asked if that constitutional provision contained its own internal scienter requirement, similar to other constitutional provisions like the Equal Protection Clause (which requires proof of "purposeful" discrimination). See id. at 547-48 (Powell, J., concurring) ("[This case] requires the Court to determine whether intent is an essential element of a due process claim, just as we have done in cases applying the Equal Protection Clause...").

If the Due Process Clause were to contain a scienter requirement, the Court thought it would be found in the term "deprivation" as it appears in the text of the Due Process Clause.[2] See id. at 548 (Powell, J., concurring) ("In the due process area, the[scienter] question is whether intent is required before there can be a 'deprivation' of life, liberty, or property."). The Parratt Court held that the term "deprivation" in the Due Process Clause contained no scienter requirement - - just as the term "deprivation" in the text of § 1983 was devoid of a state-of-mind requirement. See id. at 536-37.

Justice Powell's concurrence, however, raised serious concerns about the majority's failure to recognize a scienter requirement as part of the Due Process Clause. According to Justice Powell, "'deprivation' connotes an intentional act denying something to someone, or, at the

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[2]The Due Process Clause states:"[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1 (emphasis added).

very least, a deliberate decision not to act to prevent a loss." See id. at 548. Thus, in Justice Powell's view, merely negligent invasions of life, liberty or property by the State, "causing unintended loss of or injury to [protected liberty or property interests]," do not work "a deprivation in the constitutional sense." Id. Consequently, according to Powell, "[t]he most reasonable interpretation of the Fourteenth Amendment would limit due process claims to such active deprivations." Id. Under this formulation, states should only be required to provide citizens with "due process of law" when they invade a life, liberty, or property interest in a culpable manner.

Several years later, the Court revisited Parratt in Daniels v. Williams. The Daniels court reaffirmed the first holding of Parratt. See Daniels, 474 U.S. at 329-30 ("In Parratt v. Taylor, we granted certiorari . . . to decide whether mere negligence will support a claim for relief under § 1983. . . . [W]e concluded that § 1983, unlike its criminal counterpart, 18 U.S.C. § 242, contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right. We adhere to that conclusion.") (emphasis added) (internal quotations and citations omitted).

Daniels, however, did modify Parratt in another sense. Having determined that § 1983 contains no independent state-of-mind requirement, the Daniels Court addressed the legally distinct question of whether the Due Process Clause of the Fourteenth Amendment contains a state-of-mind requirement. See id. at 330 ("[I]n any given § 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right; and depending on the right, merely negligent conduct may not be enough to state a claim.")

Parratt had held that the Due Process Clause, unlike the Equal Protection Clause, contains no culpability requirement. Daniels overruled Parratt on this one point

alone, adopting the position of Justice Powell, who had criticized the reasoning of Parratt on the ground that the word "deprive" in the Due Process Clause connotes more than a merely negligent act. Thus, Daniels "overrule[d] Parratt to the extent that it state[d] that mere lack of due care by a state official may 'deprive' an individual of life, liberty, or property" under the Due Process Clause. See Daniels, 474 U.S. at 330-31.

Thus, after Daniels, a violation of the Due Process Clause requires proof of two elements: (1) that the state official "deprived" (i.e., culpably denied) a citizen of life, liberty, or property and (2) that the "deprivation" occurred "without due process of law." If these two requirements are met, a due process violation is established. There are no additional culpability requirements or conditions precedent that must be satisfied in order to redress the due process violation in a § 1983 damages action.

4.

The concurrence has considerable difficulty with the concept of "deprivation" articulated in Daniels. The concurrence seems to think that it has two separate applications in the instant case, when in reality it has only one. According to the concurrence, § 1983 plaintiffs seeking money damages for the non-disclosure of exculpatory evidence must first prove that the non-disclosure "deprived" them of their liberty interest in not going to jail. See ante at 4 ("[A]lleged failures to disclose do not implicate constitutional rights where no constitutional deprivation results there from. In this context, the constitutional deprivation must be defined as a deprivation of liberty without due process of law. . . . [There must be] a cognizable injury, such as a wrongful criminal conviction . . . ."). Here, "deprivation" seems to mean "infringement," devoid of any "bad faith"

connotation; and the "liberty" interest that is the object of the "deprivation" seems to mean freedom from incarceration.

The concurrence, however, then abruptly shifts to a new definitional framework. According to the concurrence, proof that the non-disclosure of exculpatory evidence resulted in your incarceration is just a baseline requirement. This sort of "deprivation" of "liberty" is good enough to get your conviction reversed. If a criminal defendant turns around and seeks money damages under § 1983, however, he must prove a different type of "deprivation" of a different type of "liberty." Specifically, says the concurrence, the criminal defendant must prove that the state actors who withheld the exculpatory evidence culpably "deprived" him of his "liberty" interest in unfettered access to exculpatory evidence. See ante at 10.

Two things immediately stand out. First, the concurrence has surreptitiously changed its definition of the underlying "liberty" interest. Second, the concurrence has surreptitiously changed the definition of "deprivation." Whereas "deprivation" in the earlier context just meant "infringement," without any scienter component, "deprivation" in this latter context requires the showing of "bad faith" discussed in Daniels a perplexing and incongruous result the concurrence produces through judicial sleight-of-hand. Cf. ante at 4 ("In this context [where only a new trial is at stake], the constitutional deprivation must be defined as a deprivation of liberty [i.e., incarceration] without due process of law"), with ante at 10 ("[Proof of incarceration] is not a sufficient condition [for § 1983 damages], however, because the Brady duty is a no fault duty . . . [whereas] the concept of constitutional deprivation articulated in both Daniels and Youngblood requires that the officer have intentionally withheld the evidence for the purpose of depriving the plaintiff of the use

of that evidence during his criminal trial. That is what is meant by 'bad faith.'").

5.

In reality, the "bad faith" requirement discussed in Daniels attaches to the "deprivation" component of the Due Process Clause in every due process case, not just § 1983 cases. This is because Daniels is a restrictive interpretation of the Due Process Clause itself, not a restriction on the operation of § 1983.[3]

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[3]Potential confusion is created by the fact that Daniels' "deprivation" doctrine was created to deal with a special problem not present in the instant case: the prolific conversion of mundane state torts into federal due process violations. Parratt, for example, involved an allegation that the State had "deprived" a prisoner of his "property" by accidentally losing his $23.00 hobby kit. Likewise, Daniels involved an allegation that the State "deprived" a prisoner of his "liberty" interest in avoiding bodily harm when a prison official accidentally left a pillow on a staircase, causing the prisoner to trip and injure himself.

The Supreme Court was concerned that federalizing such minor claims would turn the Due Process Clause into "a font of tort law to be superimposed upon whatever systems may already be administered by the States." See Daniels, 474 U.S. at 332 (quoting Paul v. Davis, 424 U.S. 693, 701 (1976)).

Thus, in order to shut down federal due process claims based on the accidental loss of hobby kits and misplaced pillows on staircases, Daniels sought to limit due process violations to those situations where the State's infringement of a citizen's liberty or property interest is more than merely negligent. The way Daniels did this was by reading a scienter requirement into the term "deprivation" in the Due Process Clause, requiring proof that the State culpably infringed those liberty or property interests as the predicate triggering the State's obligation to provide "due process of law."

Because the "deprivation" requirement came into being to limit the promiscuous federalization of state torts, the "deprivation" requirement looks like it might only apply to those cases where plaintiffs take a state tort, attempt to recharacterize it as a due process violation, and then use it as the basis for a § 1983 money damages remedy. But this is not the case, as I explain in the ensuing pages.

The crucial point the concurrence overlooks is that, in a non-§ 1983 context, where a defendant seeks only a reversal of his conviction on due process grounds, the requirement that the defendant prove a "bad faith" deprivation of some protected liberty interest is satisfied by the simple act of the State's prosecution - - a deliberate, intentional effort by the government to send a citizen to jail. It may seem strange to refer to every prosecution as being in "bad faith," unless the prosecution was executed in an unprincipled manner. But the "bad faith" requirement in Daniels, rooted in the word "deprivation," simply means a state action that is more than merely negligent - -an act that involves the willful, intentional use of government power to invade some protected life, liberty, or property interest possessed by its citizens. See Parratt, 451 U.S. at 548 (Powell, J., concurring) ("A 'deprivation' connotes an intentional act denying something to someone . . . ."); see also id. at 548 n.4 ("[T]o 'deprive' is to dispossess; bereave; divest; to hinder from possessing . . . ."). It is these types of intentional, willful exertions of government authority that raise the "abuse of power" concerns at the heart of the Due Process Clause - -concerns the Due Process Clause mitigates by making the government observe certain procedural safeguards prior to effecting the deprivation of those protected interests. See Daniels, 474 U.S. at 331 (holding that the Due Process Clause was "intended to secure the individual from the arbitrary exercise of the powers of government") (quoting Hurtado v. California, 110 U.S. 516, 527 (1884)).

Because Daniels creates only one "deprivation" analysis, rather than two, the concurrence's two-tiered formulation of Jean's case is analytically indefensible. The only thing that could save the concurrence's approach is if there were two underlying liberty interests: first, a liberty interest in avoiding incarceration (which the state "deprives" when it intentionally brings a prosecution that

results in a conviction); and second, a liberty interest in unfettered access to exculpatory evidence (which state officers "deprive" when they withhold evidence in a culpable, intentional manner).

To my knowledge, no court has ever recognized this type of freestanding liberty interest in exculpatory evidence; and I would be surprised if the Supreme Court, which has severely cut back on the expansion of fundamental liberty interests under substantive due process jurisprudence, would countenance the concurrence's curious effort to do so.[4] See Paul v. Davis, 424 U.S. 693, 710-14 (1976).

The concurrence's approach is foreclosed by Graham v. Connor, 490 U.S. 386 (1989). In Graham, the Supreme Court held that, where a particular constitutional provision "provides an explicit textual source of constitutional protection" against a particular sort of government behavior, that specific constitutional provision and "not the more generalized notion of 'substantive due process' must be the guide for analyzing these claims." Id. at 395. In other words, courts may not recharacterize state misconduct as a violation of "fundamental" liberty interests under substantive due process jurisprudence when there is a preexisting constitutional provision that already proscribes the same conduct.

In the instant case, the right to exculpatory evidence is already protected under the procedural component of the

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[4]At times, even the concurrence seems unsure about what it is doing. It creates what looks like a freestanding liberty interest in exculpatory evidence, holding that Jean must prove a "bad faith" deprivation of that interest in order to state a § 1983 damages action. See ante at 9. But the concurrence also requires, as an antecedent criterion, that the "deprivation" of the liberty interest in exculpatory evidence result in Jean's incarceration. See ante at 4-5, 9. If the right to exculpatory evidence is its own separate liberty interest, however, "bad faith" deprivations of that freestanding, legally distinct interest should create actionable due process violations regardless of whether there is an underlying incarceration associated with it.

Due Process Clause. Under this constitutional doctrine, States may not "deprive" citizens of their liberty interest in avoiding incarceration unless they first provide "due process of law" - - a term that encompasses the panoply of procedural safeguards we associate with the concept of a "fair trial." Brady is a case in this long doctrinal development elaborating the elements of a "fair trial." It held that part of the "process" the State must provide, prior to effecting the deprivation of a criminal defendant's liberty, is an unconditional right of access to exculpatory evidence. See Brady, 373 U.S. at 87.

Thus, because the right to exculpatory evidence is already protected under procedural due process, Graham prohibits the concurrence from recharacterizing the police officers' withholding of evidence as governed by substantive due process (based on the unsupportable notion that there is a "fundamental" liberty interest in exculpatory evidence).[5]

The concurrence conflates Youngblood's "bad faith" principle with Daniels' requirement that "deprivations" of liberty or property interests involve a minimum level of culpability. See ante at 5-6. The notion of "bad faith" as used in Youngblood, however, is distinguishable from the culpability requirement Daniels attaches to the term "deprivation" in the Due Process Clause. "Bad faith" in Youngblood limits what states must provide, in terms of "due process of law," prior to effecting a deprivation of a criminal defendant's liberty interest in avoiding incarceration. The culpability requirement discussed in Daniels, by contrast, limits the range of state action that

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[5]The concurrence's reliance on Arizona v. Youngblood, 488 U.S. 51 (1988), is similarly misplaced. Youngblood held that when police officers lose or misplace potentially exculpatory evidence, this does not violate a criminal defendant's procedural due process right to a "fair trial" unless the mismanagement of evidence was in "bad faith." See id. at 58.

will count as an actionable "deprivation" of liberty or property in the first instance - - the predicate that triggers the state's obligation to provide "due process of law."

The way to think about the distinction between Daniels and Youngblood in the instant case is as follows. The "fair trial" guarantee under the Due Process Clause, among other things, endows criminal defendants with certain procedural safeguards relating to the State's management and disclosure of evidence. To state a due process claim based on the State's failure to observe these evidentiary safeguards, a criminal defendant must first prove a culpable "deprivation" of his liberty. See Daniels. In the context of a criminal trial, the "deprivation" of liberty flows from the criminal prosecution itself - - an intentional effort to dispossess a citizen of his freedom by putting him in jail.

The criminal defendant must then prove that the culpable "deprivation" of his liberty (i.e., his incarceration) occurred "without due process of law." If the State has failed to disclose patently exculpatory evidence, the incarceration occurred "without due process of law" regardless of the good faith or bad faith of the non-disclosing official. See Brady. But if the State merely loses or mismanages evidence that could have been exculpatory, the incarceration comports with "due process of law" unless the mismanagement of evidence was in "bad faith." See Youngblood.

IV.

The errors in the concurrence's analysis all seem to derive from its belief that Jean's habeas petition and his § 1983 action rest on different legal foundations. For purposes of getting his conviction reversed, the concurrence says that Jean properly relied on Brady and traditional procedural due process principles, which delineate the

elements of a "fair trial." See Jean v. Rice. To get money damages for the non-disclosure of exculpatory evidence, however, the concurrence thinks that Jean needs a different legal theory, which treats the right to exculpatory evidence as a "fundamental" liberty interest rather than a "fair trial" guarantee. As part of this legal theory, Jean must also prove that the "deprivation" of his liberty interest in exculpatory evidence occurred in "bad faith" - - a culpability requirement the concurrence lifts from Daniels and then selectively applies only in that subset of cases where due process claims are brought under § 1983.

The assumption that informs the concurrence's two-tiered approach seems to be that there are two different types of due process violations, each of which is correlated with a different type of due process remedy. When the due process violation involves the state's failure to provide a procedural safeguard that comprises one element of a "fair trial" (such as the right to exculpatory evidence), the concurrence thinks the sole remedy is a new trial. A § 1983 damages remedy, however, is only available under the concurrence's analysis when the due process violation involves tortious conduct by a state official specifically, that subset of tortious conduct discussed in Daniels, involving culpable "deprivations" of state-created liberty or property interests.

This is presumably why the concurrence refuses to analyze Jean's § 1983 action as a simple attempt to vindicate the Due Process Clause's "fair trial" guarantee. Instead, when money damages are at stake, the concurrence implies that the non-disclosure of exculpatory evidence must be treated as a tortious interference with a criminal defendant's liberty interest in exculpatory evidence, rather than a procedural defect in the criminal defendant's "fair trial." Believing that the non-disclosure of exculpatory evidence is actionable under § 1983 only on a "tort" theory, rather than a "fair trial" theory, the concurrence analyzes

Jean's section 1983 action as a tort-like claim, rather than a Brady claim.

A.

Though the concurrence never fully specifies the tort that encompasses the right to exculpatory evidence, it appears to be the tort of malicious prosecution. This tort, recognized in most states, protects criminal defendants from the malicious institution or continuation of criminal proceedings that are unsupported by probable cause. See Goodwin v. Metts, 885 F.2d 157, 160 n.1 (4th Cir. 1989). Liability for malicious prosecution attaches not only to prosecutors who pursue criminal convictions without probable cause; it also attaches to police officers who cause an unfounded prosecution to continue by failing to tell the prosecutor about new exculpatory evidence uncovered since the defendant's arrest and indictment. See id. at 161-62.

As the Supreme Court noted in Albright v. Oliver, 510 U.S. 266 (1994), "the extent to which a claim of malicious prosecution is [also] actionable under § 1983 is one on which there is an embarrassing diversity of judicial opinion." Id. at 270 n.4 (internal quotations omitted). In Goodwin, decided three years before Albright, we considered a claim of malicious prosecution brought against a police officer who failed to disclose exculpatory information to a prosecutor- - evidence that would have caused the prosecutor to drop the charges had he been informed of its existence. The plaintiff brought state common law claims for malicious prosecution and a § 1983 federal claim, based on the theory that the Due Process Clause constitutionalizes the state tort of malicious prosecution. We agreed, holding that "[a] police officer who [maliciously] withholds exculpatory information from the prosecutor can be liable [for malicious prosecution]

under both section 1983 and the state common law." Id. at 162.

B.

Recasting Jean's § 1983 claim on the malicious prosecution foundation recognized in Goodwin has two implications. First, the use of a "tort-based" theory rather than a "fair trial" theory enables the concurrence to apply Daniels' "deprivation" requirement in the selective manner it desires. Specifically, the malicious prosecution framework forces Jean to prove that the "tort" Collins and Shingleton committed when they withheld the hypnosis evidence culpably infringed Jean's liberty interest in exculpatory evidence. Second, the requirement that malicious prosecution claims be supported by evidence of "malice" also ratchets up the culpability bar, even if only rhetorically, and makes it that much harder for Jean to state a successful claim for money damages.

In Albright, however, the Supreme Court called the theory behind the concurrence's tort-based approach into question when it held that the Due Process Clause does not recognize a fundamental "liberty" interest in being free from malicious prosecution. See Albright, 510 U.S. at 269-71. Subsequently, in Taylor v. Waters, 81 F.3d 429 (4th Cir. 1996), we saved our malicious prosecution jurisprudence from invalidation by issuing a saving construction of Goodwin. Specifically, we held that "[t]o the extent that Goodwin based its holding on a conclusion that the officer's failure to disclose exculpatory evidence deprived the § 1983 plaintiffs of a liberty interest in avoiding prosecution on less than probable cause, that reasoning has been rejected in Albright. . . . But, to the extent that Goodwin ruled that the officer's failure to disclose the exculpatory information deprived the § 1983

plaintiffs of their right to a fair trial, its holding is not affected by Albright." Id. at 436 n.5.

Thus, as a result of Albright, we were forced to recast the constitutional basis of malicious prosecution, employing a "fair trial" due process rationale, rather than a "tort-based" due process rationale. When police officers maliciously withhold exculpatory evidence from prosecutors, this violates the Due Process Clause because it denies criminal defendants a "fair trial" - - not because it creates a tortuous interference with a liberty interest in exculpatory evidence. Thus, contrary to the concurrence's suggestion, malicious prosecution can not furnish the tort on which to hang Jean's § 1983 action.[6]

C.

More fundamentally, the concurrence's belief that § 1983 claims must proceed on a tort theory, or not at all, is

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[6]Because Taylor precludes a tort-based approach to the right to exculpatory evidence, Jean's assertion of this right against Collins and Shingleton must be treated under the "fair trial" strand of due process jurisprudence (i.e., under procedural due process). There are two possible sources of relief for Jean within this procedural due process framework:

(1) Brady, which held that criminal defendants are denied a "fair trial" when the State fails to disclose exculpatory evidence, regardless of the good faith or bad faith of the non-disclosing official; and (2) Taylor, which held that criminal defendants are denied a "fair trial" when police officers perpetuate a groundless criminal prosecution by maliciously refusing to turn over exculpatory evidence that would have caused the prosecutor to drop the case.

Because Jean rested his § 1983 claim on Brady, rather than Taylor, Brady should presumptively guide our analysis. Recourse to Taylor would only be required if reliance on Brady was foreclosed by the "imputed to" theory (that is, if Brady did not impose disclosure duties directly on police officers). Because the "imputed to" theory is a red herring, it does nothing to disturb Brady's applicability to police officers like Collins and Shingleton. Accordingly, I would analyze Jean's case under Brady rather than Taylor.

entirely misplaced. This would only be the case if: (1) section 1983 damages were expressly reserved for due process violations involving tortious conduct; and (2) failures to comport with the Due Process Clause's "fair trial" guarantee (as expressed in cases like Brady) entitled criminal defendants only to a new trial. Neither proposition is supportable.

The Due Process Clause's "fair trial" guarantee, usually discussed under the heading of procedural due process, prohibits the State from depriving its citizens of liberty in a criminal trial unless it first observes certain procedural safeguards. While the focus in procedural due process cases is on the State's non-compliance with certain delineated "procedures," the constitutional injury in such cases goes beyond the denial of the "process" that is due. A better description of the constitutional injury would be "the deprivation of liberty without due process of law."

Reconceptualizing the constitutional injury in procedural due process cases to encompass the underlying liberty deprivation puts considerable strain on the concurrence's suggestion that a "new trial" is the sole remedy when the State fails to observe a procedural requirement, such as the obligation to disclose exculpatory evidence. While Jean finally persuaded this court to vacate his conviction because of the due process infirmities surrounding the officers' nondisclosure of the hypnosis evidence, this belated remedy was hardly commensurate with the extent of his constitutional injuries. The harm Jean endured was the deprivation of his liberty without due process of law, not merely the denial of some freestanding procedural interest in exculpatory evidence. Consequently, the nine years he spent in jail are part of the corpus of compensable injuries he sustained.

Without a § 1983 damages action, Jean will not receive compensation for the full extent of his injuries. The concurrence, however, obstinately adheres to the view that the Due Process Clause's "fair trial" guarantee is vindicated solely through new trials - - with § 1983 damages reserved for due process violations involving tortious acts by state officials. This two-tiered interpretation of the rights and remedies created by the Due Process Clause is indefensible analytically.

And in human terms, the concurrence's flawed analytical construct works a more profound injustice by denying a deserving civil rights plaintiff the relief to which he is entitled.

I respectfully dissent.

LUTTIG, Circuit Judge, dissenting:

The Supreme Court remanded this case to us for reconsideration in light of Wilson v. Layne, 526 U.S. 603 (1999). In Wilson, the Court held that "[a] court evaluating a claim of qualified immunity 'must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all . . . .'" id. at 608 (quoting Conn v. Gabbert, 526 U.S. 286, 290 (1999)), before proceeding to determine whether a right that existed was clearly established at the time that the unconstitutional conduct allegedly occurred. The plaintiff in this case, Lesly Jean, alleges that his constitutional rights under Brady v. Maryland, 373 U.S. 83 (1963), were violated, and, at least according to the concurrence, separately that his due process rights were violated, by the conduct of defendant police officers Collins and Shingleton.

As to Jean's Brady allegation, the concurrence categorically holds today that Brady is not violated when a police officer fails, for whatever reason, to produce exculpatory and material evidence to the prosecutor, and

therefore that a police officer can never be liable under Brady for the non-production of information to the prosecution. In reaching this holding, the concurrence reasons that Brady is violated only when the prosecution fails to provide exculpatory and material information to the defendant. The concurrence thus concludes that Jean has not alleged a violation of his constitutional rights under Brady by alleging that officers Collins and Shingleton failed to produce exculpatory evidence to the prosecution. I need not, and do not, express a view on this question.

As to the allegation of a separate due process violation, the concurrence also holds that, although Brady is not violated by such, the due process clause itself might independently be violated if an officer fails to provide exculpatory information to the prosecution. The concurrence holds that an independent due process violation (independent of Brady, that is) can be established, if at all, only upon proof that the officer "intentionally withheld [ ] evidence for the purpose of depriving the plaintiff of the use of that evidence during his criminal trial." Ante at 10.

Having so held with respect to the possibility of an independent due process violation, the court proceeds to conclude not that Jean has or has not alleged a due process violation, but, rather, that he has not proven that the officers in this case deprived him of due process by intentionally withholding the evidence at issue for that purpose. See, e.g., ante at 8 ("The conduct of Shingleton and Collins lies well below this threshold [of bad faith withholding of exculpatory information]."); id. ("Jean simply is unable to provide evidence of a bad faith deprivation carried out by Collins and Shingleton- - a matter on which the burden plainly rests with the plaintiff."); id. at 8 ("[Jean] does not point to any evidence showing that the officers actually knew of the significance of [the evidence at issue]."); id. ("Jean points to nothing that resembles the kind of affirmative misuse of power that

the Supreme Court has indicated would implicate due process protections."); id. at 10 ("Because there was no threshold bad faith deprivation . . . ."); id. ("[Bad faith] must be established on the basis of evidence . . . ."). Indeed, the concurrence tellingly concludes its opinion as follows: "What occurred here was at worst a negligent miscommunication among Vatcher, Collins, and Shingleton. . . ." Id. at 10-11.

I am not in a position, on the record before us, to draw such a conclusion, nor, in my opinion, is the court. And I do not even believe that it is appropriate under the qualified immunity scheme to dispose of Jean's claim on this ground. The only task properly before this court is to determine whether the plaintiffs have alleged the violation of a constitutional right, and, if so, whether that right was clearly established at the time that the alleged violation occurred - - and no more.

If the concurrence is not to undertake the proper qualified immunity analysis, then the proper course is to remand the case to the district court for further proceedings, assuming, that is, that we are going to impute to Jean first, the allegation of an independent due process violation, and second, even the specific allegation of an intentional withholding for the purpose of depriving Jean of his rights, as the concurrence does. Such a remand would permit Jean to develop, if possible, evidence to support the allegation imputed to him by the concurrence, that the information was intentionally withheld for the purpose of preventing him from using it at trial.

While the concurrence deemphasizes the fact, Jean's central (and I believe only) theory from the outset of this case has been that the failure of officers Collins and Shingleton to produce to the prosecution certain exculpatory evidence constituted a Brady violation. Given that there is no mens rea requirement under Brady, Jean has had the opportunity to develop all the facts relevant to this claim.

But it is a different matter altogether with respect to the alleged independent due process violation that the concurrence ascribes to Jean (albeit in my view questionably). With respect to this claim, Jean had no notice even that such a claim might exist, much less that, in order to prove such a claim, he would be required to establish that the evidence was intentionally withheld from him for the specific purpose of preventing him from using that evidence at trial. In other words, until today, Jean not only had no reason to believe that a violation of due process other than that recognized under Brady existed; neither did he have any reason to believe that he would be required to prove specific intent - - and the specific intent newly held to be required by the concurrence today - - in order to establish a due process violation by the non-production of exculpatory evidence. Therefore, Jean has never even had the cause, much less the opportunity, to develop a record with regard to Collins' and Shingleton's state of mind in withholding the evidence. Indeed, the only record that exists is as to what information was and was not produced to the prosecution by the defendants.

Given that Jean heretofore did not have reason to believe that he should develop a record as to the defendants' state of mind, I believe that the court is obliged at a minimum to permit Jean the opportunity to establish on remand that Collins and Shingleton intentionally withheld the evidence in question for the purpose of preventing him from using it at trial. I simply do not believe it is right to dismiss out of hand Jean's central allegation that his rights under Brady v. Maryland were violated; ascribe to him a different due process violation than he one he clearly contemplated; create for the first time the substantive standard that will govern the disposition of such a claim; and then conclude from a record entirely undeveloped as to the substantive elements of that new cause of action not even that he has failed to allege a violation, but that he has

failed to prove that violation - - and failed to do so as a matter of law. I therefore dissent from the judgment of the court.

Supreme Court of the United States
No. 98-980

LESLY JEAN,

Petitioner,

v.

DELMA COLLINS,
CHIEF OF DETECTIVES,
CITY OF JACKSONVILLE, ET AL.

ORDER ALLOWING CERTIORARI. Filed June 1, 1999.

The petition herein for writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

Supreme Court of the United States

No. 98-980

LESLY JEAN,

Petitioner,

v.

DELMA COLLINS,
CHIEF OF DETECTIVES,
CITY OF JACKSONVILLE, ET AL.

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Fourth Circuit.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court is vacated with costs, and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Wilson v. Layne*, 526 U.S. _____ (1999).

IT IS FURTHER ORDERED that the Petitioner Lesly Jean recover from Delma Collins, Chief of Detectives, City of Jacksonville, et al., Three Hundred Dollars ($300.00) for costs herein expended.

June 1, 1999

Clerk's costs: $300.00

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LESLY JEAN,

Plaintiff-Appellant,

v. No. 95-7694

DELMA COLLINS, Chief of Detectives of the City of Jacksonville, Individually; JAMES SHINGLETON, Police Officer with the City of Jacksonville, North Carolina, Police Department, Individually,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of North Carolina, at Greenville.
Malcolm J. Howard, District Judge.
(CA-94-62-4-H2)

Argued: December 2, 1997
Decided: September 17, 1998
Entered: September 17, 1998

Before WILKINSON, Chief Judge, and WIDENER, MURNAGHAN, ERVIN, WILKINS, NIEMEYER, HAMILTON, LUTTIG, WILLIAMS, MICHAEL, and MOTZ, Circuit Judges.

Affirmed by published opinion. Chief Judge Wilkinson wrote the majority opinion, in which Judges Widener, Wilkins, Niemeyer, Luttig, and Williams joined. Judge Murnaghan wrote a dissenting opinion. Judge Ervin wrote a dissenting opinion, in which Judges Murnaghan, Hamilton, Michael, and Motz joined. Judge Hamilton wrote a dissenting opinion, in which Judge Murnaghan joined.

COUNSEL

ARGUED: Richard Brooks Glazier, BEAVER, HOLT, RICHARDSON, STERNLICHT, BURGE & GLAZIER, P.A., Fayetteville, North Carolina, for Appellant. Kenneth Ray Wooten, WARD & SMITH, P.A., New Bern, North Carolina, for Appellees. **ON BRIEF:** Rebecca J. Britton, BEAVER, HOLT, RICHARDSON, STERNLICHT, BURGE & GLAZIER, P.A., Fayetteville, North Carolina, for Appellant. John R. Green, Jr., WARD & SMITH, P.A., New Bern, North Carolina, for Appellees.

OPINION

WILKINSON, Chief Judge:

We granted en banc review in this case to determine whether the district court properly dismissed Lesly Jean's section 1983 claim against Jacksonville, North Carolina police officers Delma Collins and James Shingleton. The complaint alleged their failure to disclose exculpatory evidence during Jean's criminal trial for rape and first degree sexual offenses. The district court granted summary judgment in favor of Collins and Shingleton, holding they were entitled to qualified immunity. To the extent Jean claims the officers failed to disclose evidence directly to defense counsel, we hold that the officers are entitled to absolute immunity. To the extent Jean contends Collins and

Shingleton failed to turn over evidence to the prosecutor, the officers are protected by qualified immunity. We thus affirm the judgment of the district court.

I.

On July 21, 1982, at approximately 3:00 a.m., a stranger entered the house and bedroom of Alice Kathleen Wilson and forcibly raped her. Soon after the incident was reported to the Jacksonville police, the department announced the suspect's physical description - - black male wearing a blue shirt, blue shorts, and white tennis shoes - - to its officers via radio transmission. At approximately 4:40 a.m., Officer James Shingleton spotted a man walking along a local highway who matched the basic description from the radio dispatch. Shingleton activated the blue lights on his patrol car, exited the vehicle, and stopped the person. Shingleton questioned him, instructed him to place his hands on the fender of the car, and told him he was a suspect in a rape. At that point, the suspect fled into the adjacent woods; the encounter lasted approximately one minute and a half. Later that morning, Shingleton described the person he confronted as black, five feet ten inches tall, weighing 170 pounds, with close-cut hair and a mustache, and wearing blue shorts, a blue shirt with writing, white knee-high socks, and white tennis high-tops.

Meanwhile, Wilson was transported to the hospital for treatment and then to the police station to make a statement. She described her attacker as a black male, muscular, five feet eight inches tall, weighing about 165 or 170 pounds, with a marine haircut, kinky hair, no facial hair, and wearing dark shorts that were probably navy blue, white crew socks, and high-top sneakers. Wilson also met with a sketch artist to produce a composite of the suspect. A photograph of her composite was distributed to the

Jacksonville Police Department. Afterwards, the same sketch artist also met with Shingleton but was unable to develop a reliable composite due to the incomplete nature of the officer's observations.

The following day, July 22, 1982, Detective Steve Smith, the lead investigator on the case, asked Captain Delma Collins to hypnotize Shingleton in order to garner further details about the person he stopped the morning of the crime. The hypnotic session was recorded on audio tape and its results were noted in a hypnosis information worksheet. Shingleton's memory of the possible suspect changed in at least three respects: he now believed that the tee shirt design was instead a sweat mark, he remembered that the person in fact did not have a mustache, and he recalled blue stripes on each of the person's socks. Detective Smith recorded in his notes: "As a result, his description matches the one given by victim."

On July 26, 1982, Chief of Police Roger Halbert was in a Dunkin Donuts and noticed appellant Jean, a marine stationed at Camp Lejeune in Jacksonville. Halbert believed Jean matched the composite of the suspected rapist. Halbert radioed the police department and asked that Shingleton be sent to the restaurant. When he arrived, Shingleton identified Jean as the man he had seen on the morning of the rape and accordingly arrested him. Detective Smith then interviewed Jean and, after receiving his consent, searched Jean's locker and laundry bag at the marine base. Smith seized a pair of white high-top tennis shoes, dark blue athletic shorts with white stripes, and a blue tee shirt. Jean was fingerprinted, photographed, and then released.

The following day, July 27, 1982, Smith asked Wilson to come to the police station to view a photo lineup that included Jean's photo. After viewing the lineup, Wilson was unable to make a positive identification. The next day, Wilson called Smith at the police station

requesting to look at the photos again because one of them had made her feel sick. After observing the photos a second time, Wilson picked out Jean's photo as the one that made her sick and stated that another of the photos looked "haunty." Again, however, she could not make a positive identification.

On July 30, 1982, upon the recommendation of Detective Smith, Captain Collins hypnotized Wilson in an effort to determine whether she could remember anything more about the photo that made her feel sick. Wilson's prehypnotic memories were recorded on a prehypnosis information worksheet, the session was recorded on audio tape, and new information was noted on another worksheet. At least three new pieces of information emerged during the session: Wilson believed her attacker had an accent, possibly Puerto Rican, and she recalled white shoelaces and a Nike emblem in connection with the attacker's shoes. Collins and Smith deemed the session to be unproductive due to the paucity of new details.

In the following two months, Wilson was asked to listen to voice identification recordings and view a live lineup. On August 4, 1982, after listening to several voice exemplars numerous times, Wilson stated that Jean's voice sounded like the one from her bedroom. Although Smith initially assumed she did not make a positive identification that day, Wilson later called him and explained that her statement was intended as a positive identification. She then confirmed again that Jean's voice exemplar was the voice of the man who had raped her. On September 17, 1982, Wilson was asked to view a live lineup consisting of three persons, including Jean. Wilson identified Jean as the person who had raped her and the police placed him under arrest.

Jean was indicted in October 1982 for rape and first degree sexual offenses. Despite timely discovery requests, the prosecutor did not disclose the fact that witnesses had been hypnotized until Wilson's testimony at trial. The prosecutor also did not disclose the recordings of the hypnotic sessions, despite general pretrial discovery requests and a more specific request for such recordings by defense attorneys at trial. The jury, however, was made aware of Wilson and Shingleton's hypnoses, as defense counsel cross-examined both witnesses on that point.

On December 5, 1982, Jean was convicted on all counts and sentenced to two consecutive life terms. After his direct appeals and applications for state postconviction relief proved unsuccessful, Jean filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of North Carolina. In Jean v. Rice, 945 F.2d 82 (4th Cir. 1991) (per curiam), we reversed that court's denial of his petition, holding that the government's failure to disclose the audio recordings and the accompanying reports of the hypnotic sessions was a violation of the principles announced in Brady v. Maryland, 373 U.S. 83 (1963). Accordingly, we vacated Jean's conviction. The state declined to retry Jean, and he was released from prison.

On May 20, 1994, Jean filed the present complaint against Collins and Shingleton in the United States District Court for the Eastern District of North Carolina, alleging Fourth Amendment and Fourteenth Amendment Due Process Clause violations under 42 U.S.C. § 1983 and supplementary state-law claims. The district court dismissed Jean's state causes of action, holding that one failed to state a claim and that the others were barred by the applicable statute of limitations. In a later order, the district court granted summary judgment in favor of Collins and Shingleton on Jean's section 1983 claims, holding the police officers were protected by qualified immunity. Jean

appealed the district court's summary judgment order only with respect to his due process claim. A panel of this court reversed the decision of the district court. Jean v. Collins, 107 F.3d 1111 (4th Cir. 1997). Thereafter, a majority of the judges in active service voted to rehear this appeal en banc.

II.

Initially we note that Jean's due process claim, alleging suppression of exculpatory evidence, does not clearly state the precise theory upon which it is premised. See Burns v. Reed, 500 U.S. 478, 487 (1991) (in cases implicating official immunity "it is important to determine the precise claim that petitioner has made"). At times, Jean contends his constitutional rights were violated as a result of Collins and Shingleton's failure to turn over evidence to the District Attorney's Office. At other times, however, Jean asserts that the officers generally suppressed the relevant evidence. See Compl. ¶ 41. (referring to "the actions of defendants in withholding exculpatory evidence"). Both Collins and Shingleton clearly understood Jean's complaint to allege their failure to disclose evidence directly to Jean's defense counsel. See Collins Aff. ¶ 20 ("At no time did I intentionally withhold this evidence from Mr. Jean's defense counsel."); Shingleton Aff. ¶ 21 ("At no time in my career as a police officer have I been trained that I am responsible for deciding what evidence will be presented at trial or disclosed to a criminal defense counsel in response to legal discovery requests."). To the extent Jean asserts a duty on the part of Collins and Shingleton to turn over exculpatory evidence to the defense, that claim must fail. Police officers are absolutely immune from suits

challenging a failure to disclose evidence directly to the defense.[1]

The doctrine of absolute immunity under section 1983 rests on the assumption that Congress did not intend to abolish certain well established immunities recognized by courts at the time of section 1983's enactment. Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993). To evaluate government officials' specific claims for absolute immunity, the Supreme Court has adopted a functional approach -- inquiring whether the particular official performs functions similar to those protected by common-law immunities when Congress enacted section 1983. Id. at 268-69; Burns, 500 U.S. at 484, 486; Imbler v. Pachtman, 424 U.S. 409, 430 (1976). The Court recently reaffirmed this functional approach in Kalina v. Fletcher, 118 S. Ct. 502, 510 (1997), holding that a prosecutor personally attesting to the truth of facts necessary for a probable cause determination was not absolutely immune from suit because she functioned not in a prosecutorial role, but as a witness. The Court reiterated that "in determining immunity, we examine 'the nature of the function performed, not the identity of the actor who performed it.'" Id. at 508 (quoting Forrester v. White, 484 U.S. 219, 229 (1988)); see Buckley, 509 U.S. at 269; Malley v. Briggs, 475 U.S. 335, 342 (1986); Carter v. Burch, 34 F.3d 257, 261-62 (4th Cir. 1994); see also Ireland v. Tunis, 113 F.3d 1435, 1443 (6th Cir.), cert. denied, 118

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[1]In his dissenting opinion, Judge Ervin claims we are precluded from considering the absolute immunity of Collins and Shingleton because it was not pled or addressed in prior proceedings. The officers did plead the defense of qualified immunity, however, and we may properly consider the closely related question of the scope of the immunity to which they are entitled. See Allen v. Zurich Ins. Co., 667 F.2d 1162, 1168 n.5 (4th Cir. 1982). Failure to do so here would create the possibility that qualified immunity would incorrectly be accepted as the limit of protection for police officers "performing functions that require the exercise of prosecutorial discretion." Kalina v. Fletcher, 118 S. Ct. 502, 507 (1997).

S. Ct. 560 (1997); Hill v. City of New York, 45 F.3d 653, 660 (2d Cir. 1995).

In Fletcher the Court explained that, to protect the independent judgment of prosecutors, an official is absolutely immune from suit when "performing functions that require the exercise of prosecutorial discretion." 118 S. Ct. at 507. The decision whether to disclose exculpatory evidence to an adversary is a central part of the prosecutor's trial preparation, is undertaken in the role of advocate for the State, and plainly requires the exercise of prosecutorial discretion. Imbler itself involved the prosecution's alleged suppression of material evidence at trial. 424 U.S. at 413-16. And subsequent decisions have left no doubt that prosecutors enjoy absolute immunity from claims alleging a failure to disclose exculpatory evidence. For example, the Court in Fletcher described Imbler as providing an absolute immunity defense to the prosecutor from Imbler's "charge that exculpatory evidence had been suppressed." Fletcher, 118 S. Ct. at 506. And in Burns, the Court explained that its Imbler decision, pursuant to the functional approach, held the prosecutor absolutely immune from suit for the "deliberate suppression of exculpatory evidence." Burns, 500 U.S. at 486. The Court has also stated that actions for which a prosecutor is accorded absolute immunity "must include the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made." Buckley, 509 U.S. at 273; see Ireland, 113 F.3d at 1445.

We have likewise read Imbler to require absolute immunity from section 1983 claims alleging suppression of exculpatory evidence. In Carter, we held that "the decision as to whether the evidence was exculpatory and should have been given to defense counsel . . . was clearly intended by Imbler to be the type of prosecutorial function for which

absolute immunity should be granted." 34 F.3d at 262; see also Lyles v. Sparks, 79 F.3d 372, 377 (4th Cir. 1996) ("The Supreme Court also held in Imbler that absolute immunity protected the prosecutor from allegations that he had knowingly used perjured testimony and suppressed material evidence at the plaintiff's trial."). We explained in Carter that the decision whether to disclose evidence to the defense "is clearly part of the presentation of the State's case" and represented conduct undertaken as an advocate for the State. 34 F.3d at 262-63. Other circuits have reached the same conclusion. See Moore v. Valder, 65 F.3d 189, 194 (D.C. Cir. 1995), cert. denied, 117 S. Ct. 75 (1996); Reid v. New Hampshire, 56 F.3d 332, 336 (1st Cir. 1995) ("under Imbler it is now [a] well-settled rule that a prosecutor cannot be held personally liable for the knowing suppression of exculpatory information" (internal quotation marks and citation omitted)); Hill, 45 F.3d at 661-62; Myers v. Morris, 810 F.2d 1437, 1446 (8th Cir. 1987).

To the extent, therefore, that Jean contends that Collins and Shingleton failed to disclose exculpatory evidence directly to the defense, the police officers are entitled to the same absolute immunity that would be available to prosecutors for execution of the identical function. Jean's claim casts the officers in a role much different from their traditional investigatory one. Police officers normally assemble available evidence for the prosecution rather than evaluate it for trial purposes. Buckley, 509 U.S. at 273. Prosecutors assess the material and exculpatory nature of that evidence in determining whether disclosure to the defense is required. By asserting that the police have a duty to make such sensitive legal determinations, Jean raises a claim against the officers not in their investigatory role, but instead in an advocate's role

"intimately associated with the judicial phase of the criminal process." Imbler, 424 U.S. at 430. Under the Court's approach, the officers must be accorded absolute immunity.

The fact that the defendants in the present suit are police officers, rather than prosecutors, is irrelevant to the immunity analysis. Because the immunity is tied to the nature of the function performed and not to the identity of the defendant performing that function, e.g., Fletcher, 118 S. Ct. at 508, we look to the conduct challenged by Jean's suit rather than the defendants' titular position. The Court has specifically recognized that "[w]hen the functions of prosecutors and detectives are the same, as they were here, the immunity that protects them is also the same." Buckley, 509 U.S. at 276; see also Hill, 45 F.3d at 660 (extending absolute immunity to non-attorney employees of district attorney's office under functional approach); Davis v. Grusemeyer, 996 F.2d 617, 631 (3d Cir. 1993) (extending absolute immunity to employee working for attorney "when the employee's function is closely allied to the judicial process"). It would be incongruous to hold prosecutors absolutely immune from suits concerning disclosure decisions made in the course of their traditional advocate's role while granting police officers only qualified immunity with respect to the same decisions, which fall outside their normal investigatory role.

We note finally that the same considerations underlying absolute immunity for prosecutors also support granting police officers absolute immunity from suits alleging failure to disclose exculpatory evidence to the defense. The Court in Imbler first relied upon the common-law concern that "harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties." 424 U.S. at 423. The Court noted that "[s]uch suits could be expected with some frequency, for a defendant often will transform his resentment at being

prosecuted into the ascription of improper and malicious actions to the State's advocate." Id. at 425. The same consideration countenances absolute immunity for the police officers in the present action. Because police uncover most evidence in criminal investigations, suits alleging suppression of exculpatory evidence could be leveled against them in almost every case. Imbler's observation that "a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation," id., would be no less true of police officers forced to make the difficult determinations surrounding the State's disclosure obligations. Without absolute immunity from section 1983 claims like Jean's, the police would be forced to defend against vexatious litigation and their "energy and attention would be diverted from the pressing duty of enforcing the criminal law." Id.

The Court in Imbler also relied upon the common-law concern that the fear of civil liability would create "the possibility that [a prosecutor] would shade his decisions instead of exercising the independence of judgment required by his public trust." Id. at 423. It is unlikely that police officers, who lack prosecutors' legal training, would be more able to confidently reach independent legal conclusions regarding the State's disclosure obligations without fear of civil liability. In fact, officers fearing personal liability would likely turn over much more evidence than necessary, thereby transforming the combination of section 1983 and Brady obligations into more absolute rights to discovery for criminal defendants. This would fundamentally change our adversarial system and harm the judicial process."The Brady rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur." United States v. Bagley, 473 U.S. 667, 675 (1985). Granting police officers absolute

immunity from suits alleging a failure to disclose accords with the considerations traditionally cited in favor of absolute prosecutorial immunity -- preservation of government officials' independent judgment, Imbler, 424 U.S. at 423, and the more general protection of the judicial process. Burns, 500 U.S. at 485.

Finally, we note that an adequate remedy for police officers' failure to disclose exculpatory evidence already exists in the criminal law. Whenever the State withholds material exculpatory evidence from the defense, the Constitution requires that any conviction gained thereby be vacated. Bagley, 473 U.S. at 678; Giglio v. United States, 405 U.S. 150, 155 (1972); Brady, 373 U.S. 83. The adequacy of judicial remedies for prosecutorial misjudgments "`tend[s] to reduce the need for private damages actions as a means of controlling unconstitutional conduct.'" Burns, 500 U.S. at 492 (quoting Butz v. Economou, 438 U.S. 478, 512 (1978)); Imbler, 424 U.S. at 427; Springmen v. Williams, 122 F.3d 211, 214 (4th Cir. 1997).

In sum, we find that absolute immunity for police officers performing prosecutorial functions is mandated by well-settled doctrine of the Supreme Court. We decline to make police officers into mini-prosecutors and to impose upon them obligations that would cut actual prosecutors out of the loop. From any claim that Collins and Shingleton failed to disclose exculpatory evidence directly to the defense, the officers are absolutely immune from suit.

III.

Jean next asserts that the officers had a constitutional duty under Brady to turn over evidence to the prosecution relating to Wilson's and Shingleton's hypnoses. Regardless of whether Jean's claim presently states a constitutional violation, we conclude that Shingleton and

Collins are entitled to qualified immunity. In 1982, a reasonable police officer would not have known that his failure to turn over such evidence violated a criminal defendant's clearly established constitutional rights.

A.

The basic purposes of qualified immunity are well known. The immunity is designed to shield government officials performing their duties from the burdens of trial and the threat of monetary liability. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). "Without such an immunity, the operations of government would be immobilized." Torchinsky v. Siwinski, 942 F.2d 257, 260 (4th Cir. 1991). Government officials would not perform their discretionary duties vigorously but would act timidly to avoid the risk of being haled into federal court. Anderson v. Creighton, 483 U.S. 635, 638 (1987); Harlow, 457 U.S. at 814. Society also would bear substantial costs including "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." Harlow, 457 U.S. at 814; see also Anderson, 483 U.S. at 638; Tarantino v. Baker, 825 F.2d 772, 774 (4th Cir. 1987). To limit these costs, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Malley, 475 U.S. at 341. Thus, government officials forfeit this defense only where a reasonable official would have known that an action violated clearly established constitutional rights. Harlow, 457 U.S. at 818; Winfield v. Bass, 106 F.3d 525, 530 (4th Cir. 1997) (en banc).

The requirement that a right be clearly established ensures that officials have ample notice of the legal standards that govern their conduct. See Davis v. Scherer, 468 U.S. 183, 195 (1984). Consistent with this need for notice, a court must identify the right infringed at a high

level of particularity. Anderson, 483 U.S. at 639; Winfield, 106 F.3d at 531. To define the right too abstractly would convert the defense of qualified immunity "into a rule of virtually unqualified liability." Anderson, 483 U.S. at 639; see also DiMeglio v. Haines, 45 F.3d 790, 803-04 (4th Cir. 1995). Of course Anderson does not require that a prior case have held identical conduct to be unlawful. Id. at 640. But officers cannot be ambushed by newly invented theories of liability or by unforeseen applications of old ones. Thus, "the 'contours of the right' must have been so conclusively drawn as to leave no doubt that the challenged action was unconstitutional." Swanson v. Powers, 937 F.2d 965, 969 (4th Cir. 1991) (quoting Anderson , 483 U.S. at 640); see also Lassiter v. Alabama A & M Univ., 28 F.3d 1146, 1150 (11th Cir. 1994) (en banc) ("For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what[the] defendant is doing violates federal law in the circumstances .").

In order for notice to officials to be effective, the source of that notice must be identified. It is clear that a court cannot confine its assessment of an immunity defense to Supreme Court decisions alone. See United States v. Lanier, 117 S. Ct. 1219, 1226 (1997). It is equally clear that a court cannot restrict its inquiry to cases identified by the parties. Elder v. Holloway, 510 U.S. 510, 515 (1994). But government officials must have some guideposts about the sources of law that can clearly establish a particular right. Our nation's courts produce a vast number of decisions that could conceivably influence officials' discharge of their duties. See Swanson , 937 F.2d at 968. Officials cannot be expected to master the entire corpus of this caselaw in addition to fulfilling their public responsibilities. See Davis, 468 U.S. at 196 & n.13. The very immensity of American jurisprudence creates the

distinct likelihood that jurisdictions will offer conflicting opinions over how government officials should carry out their tasks. See Swanson, 937 F.2d at 968. To hold officials responsible for sorting out these conflicts, without any guidance about what jurisprudence to follow, could generate widespread confusion over the scope of official obligations. An unbounded legal universe would give rise to guessing games over whether this or that decision in this or that jurisdiction created a clearly established right. Such a limitless universe would also give judges broad latitude to second-guess the actions of officers on the spot.

Ordinarily, therefore, courts in this circuit need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose to determine whether a right was clearly established at a particular time. Wilson v. Layne, 141 F.3d 111, 114 (4th Cir. 1998) (en banc); Wallace v. King, 626 F.2d 1157, 1161 (4th Cir. 1980). This presumption, like the Eleventh Circuit's longstanding practice, provides necessary guidance to government officials about whether a contemplated course of conduct may subject them to personal liability. See Jenkins by Hall v. Talladega Bd. Of Educ., 115 F.3d 821, 826 n.4 (11th Cir.) (en banc), cert. denied, 118 S. Ct. 412 (1997); Hamilton by and through Hamilton v. Cannon, 80 F.3d 1525, 1531 n.7 (11th Cir. 1996); Courson v. McMillian, 939 F.2d 1479, 1497-98 (11th Cir. 1991). Thus, if a right is recognized in some other circuit, but not in this one, an official will ordinarily retain the immunity defense. Of course, the converse also holds true. If a right is clearly established in this circuit but not in another circuit, that conflict will not shield the official from liability. The approach we adopt will place parameters upon the immunity inquiry -- if immunity is to stem litigation, as the Supreme Court intended, the issue of whether a right is clearly established should not send public officials on an Odyssean quest.

B.

In this case, we must analyze the state of the law in 1982 to determine whether Collins and Shingleton violated a clearly established constitutional right. Anderson requires that the right be defined at a high level of particularity. But even at the highest level of generality, the right which Jean asserts was not clearly established in 1982. Jean has failed to demonstrate that, at that time, police had a duty grounded in federal law to turn over the evidence at issue to a prosecutor. Several of the cases on which Jean relies do not even discuss whether police officers had any constitutional duty to provide evidence to a prosecutor. As of 1982, the Supreme Court had not held that police had such a constitutional duty; Brady and its progeny instead involved prosecutors' failures to disclose evidence to the defense. E.g., United States v. Agurs , 427 U.S. 97, 107 (1976); Giglio, 405 U.S. at 154; Brady, 373 U.S. at 87-88. With respect to this circuit's decisions, many of those advanced by Jean involved nondisclosure by prosecutors or are otherwise totally inapposite. E.g., Norris v. Slayton, 540 F.2d 1241, 1244 (4th Cir. 1976) (prosecutor's failure to disclose police officer's report held Brady violation); Clarke v. Montgomery Ward & Co., 298 F.2d 346, 348 (4th Cir. 1962) (private common law action for malicious prosecution brought under diversity jurisdiction). These cases simply lack the requisite factual similarity to the instant case. Police officers in 1982 could not have been expected to survey decisions involving prosecutors' failures to disclose evidence to the defense and conclude that, by analogy, they bore an independent constitutional duty to

provide evidence to prosecutors. Thus, this line of authorities cannot demonstrate that Shingleton and Collins violated Jean's clearly established constitutional rights.

Jean asserts that this circuit's opinion in Barbee v. Warden, Md. Penitentiary, 331 F.2d 842 (4th Cir. 1964), imposed a constitutional duty on police officers to give evidence to a prosecutor. In Barbee, the prosecutor failed to disclose certain police reports to the defense. Id. at 844. These reports contained the results of ballistics and fingerprint tests that cast doubt on Barbee's involvement in a shooting. Id. Although the prosecutor was unaware of the reports, this court held that his ignorance did not excuse his failure to disclose them to the defense and reversed a district court order denying Barbee postconviction relief. Id. at 846.

We believe that Jean misapprehends the essential holding of Barbee. Barbee did not require police, as a constitutional matter, to furnish evidence to a prosecutor. Instead, as this circuit later explained, Barbee held simply that the police's knowledge of such evidence would be imputed to the prosecutor in deciding whether the prosecutor had fulfilled his Brady duties. United States v. Sutton, 542 F.2d 1239, 1241 n.2 (4th Cir. 1976); see also Boone v. Paderick, 541 F.2d 447, 450-51 (4th Cir. 1976). By imputing the police's knowledge of exculpatory evidence to the prosecutor, Sutton and Barbee simply encouraged prosecutors' offices to establish "procedures and regulations . . . to insure communication of all relevant information on each case." Giglio, 405 U.S. at 154. Thus, while prosecutors are not relieved of their Brady duties for failing to disclose material evidence known only to the police, police officers who in 1982 failed to give such

evidence to prosecutors did not themselves violate a clearly established constitutional right.[2]

In sum, police officers in 1982 could reasonably have expected to be internally accountable to prosecutors for not turning over evidence in their possession. A failure to turn over exculpatory evidence might jeopardize a conviction under Brady. A failure to turn over inculpatory evidence might undermine the State's case. But the officers had no earthly idea that they would be subject to a federal cause of action for money damages when no relevant decision had held that the police's responsibility to furnish evidence to the prosecution was governed by federal constitutional law.[3]

In this case, it is undisputed that the prosecutor, Assistant District Attorney Walter Vatcher, knew that the witnesses had been hypnotized and knew the details of the

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[2]In their dissenting opinions, Judge Ervin and Judge Hamilton dispute our reading of Barbee. Our reading, however, is supported both by the Supreme Court's decision in Giglio, 405 U.S. at 154, and this circuit's decisions in Sutton, 542 F.2d at 1241 n.2, and Boone, 541 F.2d at 450-51. Each of these decisions predates the relevant conduct of Collins and Shingleton. In contrast, the dissents' view of Barbee rests on implications from caselaw that postdates the relevant conduct in this case.

[3]More recently this circuit has recognized that the failure of police officers to turn over evidence to a prosecutor may violate a criminal defendant's constitutional right to receive such evidence. See Taylor v. Waters, 81 F.3d 429, 436 n.5 (4th Cir. 1996); Carter, 34 F.3d at 264; Goodwin v. Metts, 885 F.2d 157, 162-63 (4th Cir. 1989), overruled in part by Albright v. Oliver, 510 U.S. 266 (1994). Contrary to Judge Hamilton's claim that the majority fails to explain what it means by proper notice, the decisions in Taylor, Carter, and Goodwin now provide notice to police officers that they can be subject to monetary damages under section 1983 for failure to disclose exculpatory evidence to the prosecutor. These decisions, however, all postdate the events in this case and thus we do not adopt the dissent's theory that proper notice to defendants can be notice after the fact.

various identification procedures employed by the police during their investigation. Furthermore, Collins and Shingleton maintain that they also discussed with Vatcher the existence of the reports and recordings of the hypnoses, a claim Vatcher denies. Fifteen years after trial, the parties are still disputing the value of the hypnosis-related evidence, whether Vatcher was derelict in failing to ask for further details of it, and whether Shingleton and Collins were derelict in not providing it. In fact, however, the Supreme Court in Giglio had charged the prosecution with the duty to request and evaluate relevant evidence in the State's possession. Giglio, 405 U.S. at 154. Vatcher never contends in his affidavits that he asked for any materials related to the hypnoses, as might be expected of a prosecutor's office after Giglio . Furthermore, Vatcher admitted that "[o]fficers Shingleton and Collins turned over all evidence that I requested from them." His apparent decision not to request additional details of the hypnoses cannot now be recast as a constitutional failure by the police officers to disclose such evidence.

Even if there were some general constitutional obligation in 1982 to hand over evidence to a prosecutor, the precise nature of that duty was anything but clear. Nothing in the applicable caselaw suggested that the failure to turn over evidence relating to witnesses' hypnoses violated clearly established constitutional rights. As of 1982, no decision of either the Supreme Court or this circuit had held that police committed a constitutional violation by not handing over evidence of this sort. Of course, we do not require a case with facts identical to the instant one. Anderson, 483 U.S. at 640. But here no relevant case remotely resembled the situation confronted by Shingleton and Collins. Under these circumstances, we cannot hold them liable for a constitutional infraction.

Jean finally relies on several cases from other circuits, but such cases ordinarily do not demonstrate that a

constitutional right was clearly established in this circuit. Most of these decisions do not even pertain to a police officer's failure to hand over evidence of witnesses' hypnoses to a prosecutor. Two cases did involve the disclosure of hypnosis-related evidence. One comes from the Second Circuit. United States v. Miller, 411 F.2d 825 (2d Cir. 1969). That decision does not even speak to the constitutional strictures on police conduct. Miller involved only a prosecutor's failure to disclose evidence of a hypnosis to the defense. Id. at 832. Thus, it cannot demonstrate that Shingleton and Collins violated Jean's clearly established constitutional rights.

The other case comes from the Northern District of Georgia. Emmett v. Ricketts, 397 F. Supp. 1025 (N.D. Ga. 1975). Like Miller, Emmett is not binding authority in this circuit. Further, district court decisions such as Emmett cannot clearly establish a constitutional right because "while they bind the parties by virtue of the doctrine of res judicata, they are not authoritative as precedent and therefore do not establish the duties of nonparties." Anderson v. Romero, 72 F.3d 518, 525 (7th Cir. 1995); see also D'Aguanno v. Gallagher, 50 F.3d 877, 880 n.5 (11th Cir. 1995). In addition to lacking precedential force, district court opinions from other jurisdictions function as especially poor sources of law to demonstrate that a right was clearly established. Police officers in Jacksonville, North Carolina can hardly be expected to keep abreast of legal developments in the Northern District of Georgia to determine the scope of their constitutional obligations.

C.

A word about the dissenting opinions. The three dissenting opinions together illustrate why the qualified immunity defense had to be adopted in the first place. The dissents would impose novel theories of civil liability on

officers in the absence of notice -- precisely the danger against which the defense of qualified immunity was designed to guard. See Davis, 468 U.S. at 195. The dissents somehow seize on vague proscriptions of "unfair" police conduct as determinative guideposts by which Collins and Shingleton should have measured their conduct. See post at 19 (Murnaghan, J., dissenting) (explaining that police's duty is "to protect every one of us from injustice" and that the officers' actions "were manifestly unfair"). The dissents also introduce post-1982 caselaw as support for a rule of law that officers should have anticipated in 1982. See post at 24 (Ervin, J., dissenting) (citing 1989 case); post at 29 (Hamilton, J., dissenting) (citing 1989, 1992, and 1996 cases). Furthermore, the dissents point to decisions outside this circuit as beacons of light that should have been recognized from afar by the North Carolina police officers in this case. See post at 20 (Murnaghan, J., dissenting) (citing decisions from the D.C. Circuit and the Northern District of Georgia).

In sum, the dissents would fail to provide even the rudiments of notice to those whose conduct they now rush to condemn. One even goes so far as to say that "[i]t is irrelevant whether the officers would have been on notice in 1982 that a panel of this court had held other officers liable for a Brady violation under§ 1983" because "the underlying constitutional or statutory right upon which the § 1983 action is premised" can provide the needed guidance. See post at 25 (Ervin, J., dissenting). Yet it is precisely the bare-boned vagueness of constitutional phraseology that cannot guide the qualified immunity analysis. Anderson in fact emphasized as much in rejecting "the right to due process of law" as a helpful guide. See 483 U.S. at 639 ("[I]f the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the `objective legal reasonableness' that is the touchstone of Harlow."). The hope for professional police work lies in

the guidance provided by clearly communicated rules, not in the unbounded approaches adopted by the various dissenting opinions.

This case involves an attempted end run around the absolute immunity protecting the prosecutor -- a prosecutor who knew not only of the hypnosis of witnesses but also of the various identification procedures the officers employed. Blocked from pursuing a civil damages remedy against a prosecutor who admitted receiving all the evidence he requested from the investigating police officers, Jean now tries to shift the blame to the officers themselves. Although this circuit now recognizes that police too may be subject to Brady duties, it had not yet recognized such duties in 1982. And it would be wrong to allow the thwarting fact of prosecutorial immunity to force this case into an altogether different mold -- one where the police officers are subject to constitutional duties that in fact materialized only after Jean's prosecution.

In conclusion, the relevant sources of law do not clearly establish that in 1982 police themselves labored under federal constitutional duties with respect to the disclosure of evidence to the prosecution or that such duties, if any, included a responsibility to disclose evidence relating to witnesses' hypnoses. In holding that these officers are entitled to qualified immunity, we do not diminish the seriousness of Jean's incarceration. But this court already has granted his petition for a writ of habeas corpus. Jean v. Rice, 945 F.2d 82. To go further, however, and impose money damages against Shingleton and Collins would blindside these defendants and make them into scapegoats with the aid of many years of hindsight. It would also violate the cardinal principle of qualified immunity -- that officials may not later be subject to monetary liability when their behavior at the time did not violate any clearly established constitutional right.

IV.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

MURNAGHAN, Circuit Judge, dissenting:

The substance of the point which I dissent to emphasize has been made more politely by Judge Ervin in his dissent. He has refrained, because he is more of a gentleman than I, from using some clear and simple words that judges should abide by. Judges should unflinchingly see that fairness prevails, particularly in the conduct of police. The overwhelming duty of officers sworn to enforce the law is to protect every one of us from injustice. The proper responsibility of the police is to identify, indict, convict and imprison actual criminals; the actions of Officers Shingleton and Collins, which led to the wrongful conviction and lengthy imprisonment of Lesly Jean, were manifestly unfair.

The majority opinion marks an unmistakable movement in this circuit to a rule of actually unqualified, though technically called qualified, immunity for police officers. The means by which this has been accomplished while paying lip service to qualified immunity principles are three-fold: emphasis upon the special exigencies of police work with its unique demands for spontaneous, unreflective action; a perceptible lowering of the objective reasonableness standard for assessing police awareness and conduct in particular cases; and, closely related to the latter, a dramatic narrowing of that law which, for police officers, will be considered well-settled at the critical time. The last of these is the principal vehicle by which the

majority finds qualified immunity here. Judge Ervin's dissent persuasively demonstrates the error in that analysis.

The majority holds today that "[o]rdinarily, . . . courts in this circuit need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose to determine whether a right was clearly established at a particular time." Maj. op. at 13. I disagree that such an approach should inevitably be applied, and would consider pertinent authority from other jurisdictions in determining whether a constitutional right was clearly established at the time of the alleged violation. See, e.g., United States v. Bryant, 439 F.2d 642, 650 (D.C. Cir. 1971) (holding that "[t]he duty of disclosure affects not only the prosecutor, but the Government as a whole, including its investigative agencies"); Emmett v. Ricketts, 397 F. Supp. 1025, 1040-42 (N.D. Ga. 1975) (noting that Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964), was "particularly apropos" in holding that a hypnotist hired by the prosecutor had a duty to disclose records of hypnosis). I emphasize, moreover, that a right may be clearly established even though no prior case exists involving the "very action" challenged as unlawful, see Anderson v. Creighton, 483 U.S. 635, 640 (1987), a rule we often repeat but only rarely apply.

Diligent and honest pursuit of lawbreakers by police officers is the rule, and we should require no less. That duty undoubtedly includes the obligation to furnish the prosecutor with exculpatory evidence, and that responsibility was clearly established in 1982. I dissent.

ERVIN, Circuit Judge, dissenting:

The majority holds that Lesly Jean had no clearly established constitutional right to the delivery of material, exculpatory evidence from Officers Collins and Shingleton ("the officers") to the prosecutor during his 1982 trial. For the reasons below, I find the majority's absolute immunity analysis unnecessary and its discussion of the qualified immunity question unpersuasive. Therefore, I respectfully dissent.

I.

The majority begins its analysis with an extended discussion of the officers' absolute immunity from § 1983 liability on a theory, purportedly advanced by Jean, that the officers were under a duty to deliver material, exculpatory evidence directly to Jean's defense counsel. The majority strains to point to evidence of this theory in the record because the argument is nowhere to be found in Jean's brief on appeal. In fact, Jean clearly argues that the constitutional violation at issue is the officers' failure to disclose evidence to the prosecutor, and not directly to defense counsel. In Jean's brief, the "Statement of Issue Presented for Review" identifies the constitutional right at issue as "a law enforcement officer's obligation to disclose exculpatory evidence to prosecutors." Appellant's Br. at 1 (emphasis added). In his "Summary of the Argument," Jean mentions four times, in one and one-half pages, that the officers were under an obligation to disclose evidence to the prosecutor. See Appellant's Br. at 23-24. So far as I can determine from the record, Jean has never actively pursued a theory of liability for the officers' failure to disclose evidence directly to defense counsel. For that reason, there has been no discussion of absolute immunity in any of the previous proceedings in this case.

This is significant because immunity is an affirmative defense that must be pled lest it be waived. See Gomez v. Toledo, 446 U.S. 635, 640 (1980); Wilkes v. Young, 28 F.3d 1362, 1377 n.12 (4th Cir. 1994) (Phillips, J., dissenting); Buenrostro v. Collazo, 973 F.2d 39, 44 (1st Cir. 1992). While the officers' answer to the complaint raises the defense of "qualified good faith immunity," see J.A. at 39, it says nothing of absolute immunity. On this very question, the Sixth Circuit has held that a defendant waives his right to absolute immunity if he raises only qualified immunity in his answer, motion to dismiss, or summary judgment motion. See Collyer v. Darling , 98 F.3d 211, 222 (6th Cir. 1996) ("Although [the defendant] did raise the affirmative defense of qualified immunity, an absolute immunity determination involves an entirely different analysis. Given that the defense of absolute immunity was not affirmatively pleaded or argued . . . and in light of the significant distinctions between qualified and absolute immunity claims, this defense was affirmatively waived .. . ."), cert. denied, 117 S. Ct. 2439 (1997).

If, as the majority believes, "Collins and Shingleton clearly understood Jean's complaint to allege their failure to disclose evidence directly to Jean's defense counsel," maj. op. at 6, then the officers were obliged to raise absolute immunity as an affirmative defense in their answer to that complaint or, at the very least, in their memorandum in support of their motion for summary judgment. While I do not believe that Jean has proceeded on a theory that police officers must disclose evidence directly to defense counsel, if the majority is correct that he has, then the officers have waived any claim of absolute immunity that may have been available.

I also would note that the majority's discourse on absolute immunity does nothing to call into question our cases in which police officers have been held liable for money damages for failure to turn over material,

exculpatory evidence to the prosecutor. See Taylor v. Waters, 81 F.3d 429, 436 n.5 (4th Cir. 1996); Carter v. Burch, 34 F.3d 257, 263-64 (4th Cir. 1994). The majority's discussion of absolute immunity merely clarifies that, as a matter of theory, a police officer may be liable for a Brady violation under § 1983, not because he is under a duty to disclose evidence directly to defense counsel, but rather, because his duty is to deliver such information to the prosecutor.

II.

Having toppled its straw man, the majority proceeds to answer the real question raised by this case -- whether the officers are entitled to qualified immunity on Jean's theory that they were under a duty to deliver material, exculpatory evidence to the prosecutor. In section III of its opinion, the majority holds that the officers are entitled to qualified immunity because it was not clearly established in 1982 that the officers violated the law in failing to hand over material, exculpatory evidence to the prosecutor. For the reasons I expressed in my opinion for the panel in this case, see Jean v. Collins, 107 F.3d 1111 (4th Cir. 1997), vacated, (Sep. 19, 1997), and for those articulated byJudge Hamilton in his concurring opinion, see Jean, 107 F.3d 1118-20, I disagree with the judgment of the majority of the court. Aside from those general arguments, however, I wish to point out my specific disagreements with the reasoning in the majority opinion.

In order to do this, it is helpful to recognize exactly what requests for evidence were made by defense counsel in this case. Defense counsel in fact made two requests for evidence. The first was a generalized motion for discovery that included the following requests: 1) "[t]o disclose the facts and circumstances surrounding any . . . pretrial identification;" and 2) "[t]o permit the defendant to inspect

and copy . . . mechanical or electronic recordings, tangible objects, or copies or portions thereof." Jean v. Rice, 945 F.2d 82, 85 (4th Cir. 1991).

The second request for evidence came after trial had already begun, when defense counsel learned for the first time, during the State's direct examination of the victim, that both she and Officer Shingleton had been hypnotized by Collins. At that point, defense counsel renewed their motion for discovery and asked the prosecution for any tapes or notes that were made during the hypnoses. The panel that granted Jean's habeas petition recognized this second request, see Jean, 945 F.2d at 85 ("After learning of the hypnosis, counsel requested any recordings that might exist -- inexplicably the state still did not provide its records or tapes."), as does the majority in this case, see maj. op. at 5 ("The prosecutor also did not disclose the recordings of the hypnotic sessions, despite general pretrial discovery requests and a more specific request for such recordings by defense attorneys at trial."). Defense counsel not only made a "more" specific request for evidence, they could not have been any more specific: defense counsel requested an audiotape or notes from the hypnoses, if any such tape or notes existed. We know now that the officers created an audiotape and took notes during the hypnoses, that this evidence was in the officers' possession, and yet it was not given to the prosecutor.

I point this out to indicate how the majority's discussion in page 16 of its opinion is not dispositive of the question on appeal. As to the first, generalized request for discovery, the majority argues that because of the nature of the evidence in question (hypnosis evidence), the officers may or may not have known that such evidence would fall under the rubric of material, exculpatory evidence. But as to defense counsel's second request, specifically asking for any existing tapes or notes of the hypnoses, the nature of the evidence drops out of consideration.

Surely the majority would agree that, as a general matter, Jean had a clearly established right in 1982 to material, exculpatory evidence that had been specifically identified and requested by his defense counsel. In light of defense counsel's specific request for tapes or notes from the hypnoses, the nature of the evidence is irrelevant to the Brady question. Defense counsel requested any audiotape or notes that might exist regarding hypnosis; those tapes and notes existed, the officers knew they existed and were within their control, and yet the officers did not turn them over to the prosecutor.

Stripped of its surplusage, then, the majority's holding in this case rests on its argument that in 1982 a reasonable police officer would not have known that in concealing evidence from the prosecutor he violated the constitutional rights of a criminal defendant. The majority concedes that recent precedent in this circuit recognizes that such police misconduct can be a violation of a defendant's constitutional rights. See maj. op. at 15 n.3 (citing Goodwin v. Metts, 885 F.2d 157, 162-63 (4th Cir. 1989), overruled in part by Albright v. Oliver, 510 U.S. 266 (1994)). The majority's argument is simply that while this right is now clearly established, it was not in 1982. Although the majority cites and recognizes this court's decision in Goodwin v. Metts, the majority fails to appreciate its significance.

In Goodwin, the court confronted the identical question posed in this case: whether a police officer should receive qualified immunity in a § 1983 action for failing to disclose exculpatory information in his possession to the prosecutor. The importance of Goodwin is that the conduct at issue in that case occurred in 1983, the year after the events at issue in this case. Goodwin held that a police officer was not entitled to qualified immunity for failure to turn over exculpatory evidence to a prosecutor because such conduct violated a constitutional right that was clearly

established in 1983: "A reasonable officer would have known that a prosecution carried out without . . . disclosure of exculpatory information would violate the constitutional rights of the criminal defendants." Goodwin, 885 F.2d at 164. Since the majority does not call Goodwin into question, I assume the majority would agree that had the events at issue in this case taken place in 1983, the illegality of the officers' conduct would have been clearly established.

The majority's analysis of this issue reveals a misunderstanding about my use of Goodwin, see maj. op. at 17, as well as the nature of qualified immunity. A right does not become clearly established when a plaintiff successfully brings an action to enforce it under § 1983, as the majority apparently believes. See maj. op. at 15 ("[T]he officers had no earthly idea that they would be subject to a federal cause of action for money damages . . . ."); maj. op. at 15 n.3 ("Goodwin now provide[s] notice to police officers that they can be subject to monetary damages under section 1983 . . .."). It is irrelevant whether the officers would have been on notice in 1982 that a panel of this court had held other officers liable for a Brady violation under § 1983. The question is whether the underlying constitutional or statutory right upon which the § 1983 action is premised was clearly established at the time the officers acted. Goodwin is clear in its holding that the constitutional right at issue in this case was clearly established in 1983, one year after the officers' conduct here.

In order to go along with the majority's position, then, one must assume that a case was decided between 1982 and 1983 which clearly established that police officers violate the constitutional rights of a criminal defendant when they conceal material, exculpatory evidence from the prosecutor. This is the only way to reconcile the majority's opinion, holding that "police officers who in 1982 failed to

give [exculpatory] evidence to prosecutors did not themselves violate a clearly established constitutional right," see maj. op. at 15, and Goodwin, holding that police officers who failed to perform the same duty in 1983 did violate a clearly established right. Of course, no such case exists. A criminal defendant's constitutional right to have the police turn over material, exculpatory evidence to the prosecutor has been clearly established in this circuit since at least 1964.

> [I]t makes no difference if the withholding[of exculpatory evidence] is by officials other than the prosecutor. The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure. If the police allow the State's Attorney to produce evidence pointing to guilt without informing him of other evidence in their possession which contradicts this inference, state officers are practicing deception not only on the State's Attorney but on the court and the defendant.

Barbee v. Warden, Md. Penitentiary, 331 F.2d 842, 846 (4th Cir. 1964) (emphasis added) (footnote omitted).

The majority believes that, in 1982, the law of this circuit held that if a police officer withheld exculpatory evidence from a criminal defendant, this misconduct was not a direct constitutional violation, but rather, was "imputed to" the prosecutor. The majority's "imputed to" theory is an elaborate legal fiction that emanates from a footnote in our decision in United States v. Sutton, 542 F.2d 1239, 1241 n.2 (4th Cir. 1976). The majority creates this "imputed to" legal fiction based on a single footnote in Sutton, ignoring this court's clear holdings in Barbee and

its progeny. The majority ignores Barbee's plain statement that the police misconduct at issue in this case practices a deception "not only" on the prosecutor, but on the court "and the defendant." See Barbee, 331 F.2d at 846. The most logical and consistent interpretation of this court's precedent suggests that Jean's right to material, exculpatory evidence has been clearly established since our decision in Barbee.

More importantly, if a police officer's misconduct was "imputed to" the prosecutor in 1982, the majority fails to explain at what point since 1982 we rejected the "imputed to" analysis. The majority recognizes that our circuit has recently upheld § 1983 judgments against police officers who withheld material, exculpatory evidence from a criminal defendant. See maj. op. at 15 n.3. This means that a police officer's withholding of exculpatory evidence is no longer "imputed to" the prosecution for purposes of holding an officer liable under § 1983. The majority points to no authority to explain how this kind of police misconduct was "imputed to" the prosecutor in 1982, but is now its own direct violation of a criminal defendant's constitutional rights.

The simple answer here is that no authority exists to explain this change because the change never occurred in the first place. At least since Barbee in 1964, a reasonable police officer in North Carolina would have known that a criminal defendant has a clearly established right to have officers deliver material, exculpatory evidence to prosecutors. For that reason, the officers in this case are not entitled to qualified immunity for their misconduct.

III.

According to the majority, holding Collins and Shingleton liable for the violation of Jean's constitutional rights would make them scapegoats. Nothing could be further from the truth-- the real scapegoat in this matter is Lesly Jean. Jean spent nine years in prison for a crime he did not commit because police officers used "hypnosis" to alter the description of the perpetrator of this crime so that it matched Jean's appearance and his clothes.

The officers in this case are not scapegoats. To the contrary, they are without doubt responsible for the mockery of justice that resulted in Jean's nine-year confinement. As I have argued, the question before us is whether a reasonable police officer would have known in 1982 that concealing evidence from the prosecutor violated the constitutional rights of a criminal defendant. While qualified immunity should be invoked in every case in which an officer's conduct was arguably within the bounds of the law, in this case no such argument can be made. The officers' conduct in the prosecution of Jean was reprehensible and a total betrayal of the trust that society places in those whom it empowers to enforce the law. That Jean will not be allowed the opportunity to present his claim to a jury only perpetuates the injustices that have befallen him in the legal process, and

I respectfully dissent. Judges Murnaghan, Hamilton, Michael, and Motz join in this dissent.

HAMILTON, Circuit Judge, dissenting:

The major theme of the majority's opinion is "No Case on Point!" That is, the majority leaves no doubt that, to avoid the qualified immunity gauntlet, a § 1983 plaintiff must demonstrate that in a prior case decided by the

Supreme Court, this court, or the highest court of the state in which the case arose, the conduct engaged in by the government official was held to be constitutionally unlawful. The "No Case on Point" doctrine makes a mockery of the Supreme Court's decision in Anderson v. Creighton, 483 U.S. 635 (1987). In Anderson, the Supreme Court explicitly held that a § 1983 plaintiff need not show that in a prior case the government official's actions were held to be constitutionally unlawful. Id. at 640. Because the majority fails to follow Anderson, I dissent.

Qualified immunity turns on whether, at the time of the government official's conduct, the actions of the government official violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The "contours of the right must be sufficiently clear that a reasonable official would understand what he is doing violates that right." Anderson, 483 U.S. at 640. In other words, the government official's action in question need not have previously been found to be unlawful, see id.; rather, "in light of pre-existing law the unlawfulness must be apparent," id.

At the time of Shingleton and Collins' actions in 1982, our case law clearly established that a defendant's due process rights were violated when the police concealed material exculpatory evidence. See Barbee v. Warden, 331 F.2d 842, 846 (4th Cir. 1964); see also Boone v. Paderick, 541 F.2d 447, 450-51 (4th Cir. 1976) (holding that duty to disclose not "neutralized because [evidence] was in the hands of the police rather than the prosecutor"). As we noted in Barbee:

> Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposefully, or negligently, withheld. And it makes no difference if the withholding is by officials other than the prosecutor. The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure. If the police allow the State's Attorney to produce evidence pointing to guilt without ever informing him of other evidence in their possession which contradicts this inference, state officers are practicing deception not only on the State's Attorney but on the court and the defendant. . . .

331 F.2d at 846 (footnote omitted).

In holding that Shingleton and Collins are entitled to qualified immunity, the majority first posits that a reasonable officer in 1982 would not have known that withholding material exculpatory evidence violated Jean's constitutional rights. This proposition is tomfoolery. Barbee established the proposition that a criminal defendant has the constitutional right to have the police disclose material exculpatory evidence. Id. In cases post-Barbee, we have consistently held that a police officer can be liable under § 1983 for the failure to disclose material exculpatory evidence. See Taylor v. Waters, 81 F.3d 429, 436 n.5 (4th Cir. 1996); Carter v. Bunch , 34 F.3d 257, 264 (4th Cir. 1992); Goodwin v. Metts, 885 F.2d 157, 162-63 (4th Cir. 1989), overruled in part by Albright v. Oliver, 510 U.S. 266 (1994). Because there have been no cases since Barbee altering the longstanding principal that a police officer has

the duty to disclose material exculpatory evidence, Shingleton and Collins are not entitled to qualified immunity.

The majority does explain in a footnote what it would take to make the unlawfulness of Shingleton and Collins' actions"apparent." The majority posits that our decisions in "Taylor , Carter, and Goodwin now provide notice to police officers that they can be subject to monetary damages under section 1983 for failure to disclose exculpatory evidence to the prosecutor." Ante at 15 n.3. Thus, according to the majority, a case on point is required to provide the necessary notice to police officers before they can be liable under§ 1983. This is precisely what Anderson says is forbidden. See 483 U.S. at 640.

Perhaps an even more fundamental problem with the majority's analysis is its failure to explain why the unlawfulness of the conduct of the officers was apparent to the officers in Goodwin (where the officers' actions occurred in 1983), but was not apparent to Shingleton and Collins in 1982. Judge Ervin correctly points out that there was no intervening decision between 1982 and 1983 that woud have made the officers in Goodwin more aware of their unlawfulness than Shingleton and Collins. See ante at 23-25. Thus, in the absence of an intervening decision, there is no rational way to square the reasoning of Goodwin--that a police officer is not entitled to qualified immunity for his failure to disclose material exculpatory evidence, if his actions occurred in 1983--with the reasoning of the majority--that a police officer is not entitled to qualified immunity for his failure to disclose material exculpatory evidence, if his actions occurred in 1982. This point is important because it illustrates the dramatic shift in our qualified immunity jurisprudence. Whereas a case on point was not required when Goodwin was decided, now one is. And such "case on point" decisionmaking is patently at odds with Anderson.

In a last ditch effort to find qualified immunity, the majority also posits that a reasonable officer would not have known that withholding exculpatory evidence in the form of statements given under hypnosis violated Jean's constitutional rights. This rationale is even more absurd than the first one served up by the majority. Suffice it to say that exculpatory evidence is exculpatory evidence. The nature of the exculpatory evidence is simply irrelevant. To hold otherwise would turn Brady v. Maryland, 373 U.S. 83 (1963), on its head.

It follows that I would reverse.

Judge Murnaghan joins in this dissent.

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LESLY JEAN,
Plaintiff-Appellant,

v.

DELMA COLLINS, Chief of Detectives,
of the City of Jacksonville, Individually;
JAMES SHINGLETON, Police Officer
with the City of Jacksonville, North Carolina,
Police Department, Individually,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of North Carolina, at Greenville.
Malcolm J. Howard, District Judge.
(CA-94-62-4-H2)

Argued: September 27, 1996

Decided: March 7, 1997

Entered: March 7, 1997

Before ERVIN and HAMILTON, Circuit Judges, and
SPENCER, United States District Judge
for the Eastern District of Virginia, sitting by designation.

Reversed and remanded by published opinion. Judge Ervin wrote the opinion, in which Judge Spencer joined. Judge Hamilton wrote a concurring opinion.

COUNSEL

ARGUED: Rebecca J. Britton, BEAVER, HOLT, RICHARDSON, STERNLICHT, BRUGE & GLAZIER, P.A., Fayetteville, North Carolina, for Appellant. Kenneth Ray Wooten, WARD & SMITH, P.A., New Bern, North Carolina, for Appellees. **ON BRIEF:** Richard B. Glazier, BEAVER, HOLT, RICHARDSON, STERNLICHT, BRUGE & GLAZIER, P.A., Fayetteville, North Carolina, for Appellant. John R. Green, Jr., WARD & SMITH, P.A., New Bern, North Carolina, for Appellees.

OPINION

ERVIN, Circuit Judge:

Lesly Jean (Jean) appeals from an order of the district court dismissing his case with a grant of summary judgment. For the reasons set forth below, we vacate the grant of summary judgment and remand for further proceedings in the district court.

I

Jean brought suit against Captain Delma Collins (Collins), Chief of Detectives of the City of Jacksonville, and Officer James Shingleton (Shingleton), a police officer with the city, for malicious prosecution, false arrest, arrest absent probable cause, and violation of Jean's due process right under Brady v. Maryland, 373 U.S. 83 (1963), to have exculpatory evidence disclosed to defense counsel during a criminal prosecution. These claims were brought pursuant to 42 U.S.C. § 1983 and state law. The state law claims were dismissed prior to the summary judgment stage, and because Jean does not appeal their dismissal, they are not at issue here. Jean's § 1983 claims are related

to the government's use of hypnotically-enhanced testimony at Jean's criminal trial for rape and to the prosecution's failure to fully disclose exculpatory evidence related to the hypnosis.

The district court granted defendants' motion for summary judgment on the § 1983 claims for several reasons. In his appeal Jean assigns error only to the district court's determination that, as a matter of law, defendants are entitled to qualified immunity on the Brady issue because Jean's right to have the government disclose the evidence regarding the hypnotically-enhanced testimony was not clearly established in 1982. Our review of this grant of summary judgment based on a finding of qualified immunity is de novo because it is a matter of law. Pritchett v. Alford, 973 F.2d 307, 313 (4th Cir. 1992).

II

On July 21, 1982, Kathleen Wilson (Wilson) was brutally raped and beaten at her home in the early morning. A police officer arrived, took a very brief description of the perpetrator, and immediately broadcast it on the police radio. Patrolman Shingleton, a defendant in this case, heard the broadcast and stopped a man walking along the highway who fit the description. After a brief encounter, the man fled and was not found again. Later that morning, Shingleton described the man he had seen, but he was unable to provide much detail. At the hospital shortly after the attack, Wilson provided police with a description of her attacker and worked with a sketch artist to create a likeness of the perpetrator. The description provided by Wilson did not match, in many respects, that provided by Shingleton.

The next day Collins, then head of the detective division and a defendant in the instant case, decided to hypnotize Shingleton to enhance his memory of the encounter with the suspect on the street. Apparently both

officers knew the content of Wilson's description and knew that it differed from Shingleton's description, but it is unclear whether they had also both seen the composite sketch prepared by Wilson and the sketch artist. Collins' formal instruction in hypnosis consisted of a two-week training course; he had conducted several hypnoses for the department and he read publications about hypnosis as an investigative technique. Despite his training, Collins did not take detailed notes or record the hypnosis. He only recorded in his log that the description given by Shingleton after the procedure matched the one given by Wilson.

A few days after the attack a police officer in a donut shop encountered Jean, a marine stationed at the military base near Wilson's apartment, and the plaintiff in this case. Believing that Jean resembled one of the descriptions, the officer called Shingleton. Shingleton identified Jean as the man he had seen on the roadside, and he testified later that he was able to identify Jean due to the hypnosis. Jean was placed under arrest.

Officer Smith, another officer working on the investigation, showed Wilson a photo lineup with five pictures, one of which was Jean's. She stated that none of the pictures were of her assailant, but said that one photo - - not Jean's - - made her uncomfortable. The next day she telephoned the officer and asked to see the photo lineup again. This time Wilson said that Jean's eyes made her feel ill, but she did not say that Jean had been her attacker.

At this point Collins and Shingleton decided to hypnotize Wilson to enhance her ability to identify her perpetrator's photo.[1] The actual hypnosis was audiotaped,

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[1]The hypnosis itself was very suggestive, and during the procedure the officers effectively persuaded Wilson that Jean could have been her assailant. However the validity of the procedure itself is not at issue today, but only the exculpatory nature of evidence regarding the procedure.

but not the pre - - or post-hypnotic conversations and descriptions. Officer Collins did fill out worksheets prior to and after the hypnosis.

In the weeks following the hypnosis, Wilson listened to voice exemplars and, after a week's delay and several play-backs, tentatively selected Jean's voice. Wilson also picked Jean out of a three person lineup.[2]

Prior to Jean's trial for rape and sexual assault, his attorneys timely filed a discovery motion requesting, among other things, disclosure of "facts and circumstances" surrounding any pre-trial identification; inspection of recordings tangible to the preparation of his defense; and results and reports of any physical examinations, tests, measurements, and experiments made in connection with the case. Despite this motion, the state did not inform Jean's counsel that the victim had ever seen Jean's photograph prior to the lineup, or that Wilson or Shingleton had ever been hypnotized. Moreover the state did not disclose any of the documentation of the hypnoses and how the descriptions had been affected by them. Not until the victim had testified on direct examination during the trial did Jean's counsel learn of the hypnosis. Even after counsel discovered the hypnosis and requested all records and recordings relating to the procedures, the state still refused to disclose the requested material, denying that any records existed.

The jury returned guilty verdicts against Jean on all counts, and he was sentenced to two consecutive life sentences. After exhausting his appeal of right at the state level, and filing for writs of habeas corpus in state courts and in a federal district court, his case came before us. In

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[2]These two identification procedures were also highly suggestive and unreliable in several respects, but are not in and of themselves at issue in this case.

1991, we reversed the decision of the district court denying habeas relief and found that the state's failure to turn over evidence relating to the hypnosis and other identification procedures violated Brady v. Maryland, 373 U.S. 83 (1963). Jean v. Rice, 945 F.2d 82 (4th Cir. 1991) (per curiam). We further found that the evidence at issue had certainly been material, as most of the non-identification evidence presented at trial tended to exculpate rather than implicate Jean. Id. at 87. On that basis we vacated Jean's conviction and remanded for further proceedings. The state declined to try Jean again, and he was released after serving nine years in prison.

III

A government official is entitled to qualified immunity from civil liability under § 1983 when his or her "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). See also Taylor v. Waters, 81 F.3d 429, 433 (4th Cir. 1996); Pinder v. Johnson, 54 F.3d 1169, 1173 (4th Cir. 1995) (en banc), cert. denied, 116 S.Ct. 530 (1996); Pritchett v. Alford, 973 F.2d 307, 312 (4th Cir. 1992).

The first step in assessing whether a particular official is entitled to qualified immunity involves identification of the specific right which the official allegedly infringed. Taylor , 81 F.2d at 433; Pritchett, 973 F.2d at 312. A court must next determine whether the right was clearly established at the time of the alleged violation. Pritchett, 973 F.2d at 312. These two inquiries are exclusively legal ones. Id. If the first two criteria are met, it must next be decided whether a reasonable person in the officer's position would have known that his or her actions would violate the right. Id. This assessment involves application of an objective test to the particular facts of the

case, and jury determinations may be required to settle disputed aspects of those facts. Id. See also Anderson v. Creighton, 483 U.S. 635, 646 n.6 (1987). We will address each element of the three part test for qualified immunity in turn; if Jean is able to satisfy each prong of the test then Collins and Shingleton are not entitled to qualified immunity from suit.

A

With respect to the first prong of the test, Shingleton and Collins vigorously argue that Jean has not properly identified the constitutional right violated by the state's failure to disclose the evidence at his trial. We find this argument to be unpersuasive. In our decision to vacate Jean's conviction on habeas review, we plainly held that the state's failure to comply with Brady v. Maryland, 373 U.S. 83 (1963), and its progeny violated Jean's constitutional rights. Jean v. Rice, 945 F.2d at 87. Both the Supreme Court and this Circuit, when addressing Brady issues, have grounded a defendant's right to exculpatory evidence in the Due Process Clause of the Fourteenth Amendment. See, e.g., Brady, 373 U.S. at 85; Wise v. Warden, Maryland Penitentiary, 839 F.2d 1030, 1033 (4th Cir. 1988); Boone v. Paderick, 541 F.2d 447, 448 (4th Cir. 1976), cert. denied, 430 U.S. 959 (1977). More than three decades ago we held that failure of the police to disclose impeachment evidence involves a "question of fundamental fairness rising to the level of constitutional due process which cannot be brushed aside as a mere error in evidentiary ruling." Barbee v. Warden, 331 F.2d 842, 847 (4th Cir. 1964).

Shingleton and Collins further argue that the Supreme Court's decision in Albright v. Oliver, 510 U.S. 266 (1994), means that Jean cannot vindicate his Brady violation through the Fourteenth Amendment. We disagree with this reading of Albright. Albright is an admittedly

confusing decision because it lacks a majority opinion; instead it has one plurality and several concurring and dissenting opinions. However, perhaps its clearest, most relevant holding is found in the plurality opinion of Chief Justice Rehnquist:

> Where a particular Amendment "provides an explicit textual source of constitutional protection" against a particular sort of government behavior, "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."

Id. at 273 (quoting Graham v. Connor, 490 U.S. 386, 394 (1989)).

Albright does not preclude Jean's cause of action because the right to disclosure of exculpatory evidence is grounded directly in the Due Process Clause itself. See Brady, 373 U.S. at 85 ("We agree with the Court of Appeals that suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment."). Language used by Justice Stevens in his dissent in Albright suggests strongly that Brady and Giglio v. United States, 405 U.S. 150, 153-54 (1972), are examples of the sorts of liberty protections which go beyond the strictly procedural and are therefore properly within the domain of substantive due process. Albright, 510 U.S. 266, 299, & n.15 (Stevens, J., dissenting). "Our cases make clear that procedural regularity notwithstanding, the Due Process Clause is violated by the knowing use of perjured testimony or the deliberate suppression of evidence favorable to the accused." Id.

We have already recognized that Albright does not preclude causes of action grounded directly in the Fourteenth Amendment. In Taylor v. Waters, 81 F.3d 429 (4th Cir. 1996), we stated in a footnote that Albright did not change the fact that an officer's failure to disclose exculpatory evidence deprives a defendant of his or her due process right to a fair trial and can be actionable under § 1983. Id. at 436 n.5. Specifically, we stated that while Albright rendered part of our previous holding in Goodwin v. Metts, 885 F.2d 157 (4th Cir. 1989), cert. denied, 494 U.S. 1081 (1990), invalid, it did not affect the portion of our holding which allowed a § 1983 claim for a Brady violation. For these reasons, Shingleton and Collins are mistaken to rely on Albright in the instant case.

We find that Jean has properly grounded his instant claim in the Due Process Clause of the Fourteenth Amendment and that he has satisfied the first prong of the test to determine whether Shingleton and Collins are immune from suit.

B

In deciding whether Shingleton and Collins are entitled to qualified immunity we must next determine whether the specific right infringed was clearly established in 1982. Pritchett v. Alford, 973 F.2d 307, 312 (4th Cir. 1992). "In determining whether the specific right allegedly violated was 'clearly established,' the proper focus is not upon the right at its most general or abstract level, but at the level of its application to the specific conduct being challenged." Id.; see also Anderson v. Creighton, 483 U.S. 635, 639-40 (1987); Gooden v. Howard County, Md., 954 F.2d 960, 968 (4th Cir. 1992) (en banc). We must, however, strike a balance and avoid defining the right so narrowly, in a manner which is so dependant upon the facts of this very case, that qualified immunity is virtually

guaranteed. "Of course, 'this is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.'" Gooden, 954 F.2d at 968 (quoting Anderson v. Creighton, 483 U.S. at 640).

The district court determined that disclosure of hypnosis-related evidence was not a clearly established right in 1982. Shingleton and Collins, together with the district court suggest that while exculpatory evidence had to be disclosed as early as Brady, impeachment evidence is much different and the requirement of its disclosure did not arise until 1985. We find this analysis to be incorrect for two reasons.

First, we believe that appellees draw an artificial bright-line between impeachment and exculpatory evidence. They fail to recognize that the evidence that the eyewitnesses against Jean had their memories enhanced and influenced by hypnosis has both exculpatory and impeachment implications. Certainly the hypnosis could have been used to provide material for cross-examination of the eye-witnesses. It could also have been used to show that, prior to the suggestive procedures, the descriptions given by the witnesses were of a person other than Jean. This aspect makes the evidence exculpatory and not merely relevant for impeachment.

More importantly, disclosure of even purely impeachment evidence was required well before 1982. The Supreme Court's decision in Giglio v. United States, 405 U.S. 150, made clear in 1972 that evidence tending to cast doubt upon the credibility of a government witness should be disclosed under Brady:

> Thereafter Brady v. Maryland held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule.

Id. at 153-54 (citations omitted). In Giglio the Court went on to find that evidence that a key government witness had been offered immunity from prosecution for his testimony had sufficient bearing on that witness' credibility, and was certainly material to the determination of defendant's guilt, and therefore it should have been disclosed to the defense. Id.

Several cases which followed Giglio confirm that it in fact established the right to disclosure of credibility evidence. In Boone v. Paderick, 541 F.2d 447 (4th Cir. 1976), cert. denied, 430 U.S. 959 (1977), we found that the existence of a cooperation agreement with a prosecution witness was clearly relevant to the credibility of that witness; that the jury might not have convicted the defendant if they had reason to doubt the credibility of the government's main witness; and that failure to disclose such evidence was a violation of Giglio and Brady. Id. at 448-49. See also Campbell v. Reed, 594 F.2d 4 (4th Cir. 1979).

Shingleton and Collins raise two arguments attempting to refute the pre-1982 precedent on this issue. They first argue that there was no holding specifically affirming the impeachment value of evidence of hypnosis. The very behavior at issue, however, need not have been specifically addressed by a court for the right to be free from that behavior to have been clearly established. Gooden, 945 F.2d at 968. Moreover, as early as 1969, courts in other jurisdictions had found a duty to disclose

evidence relating to hypnosis. In 1969, Judge Friendly of the Second Circuit, granted a new trial in a case in which the prosecutors failed to disclose that the main witness had been hypnotized during the pre-trial investigation. United States v. Miller, 411 F.2d 825, 832 (2d Cir. 1969). The reversal was required despite the fact that the hypnosis itself closely followed procedure and was not at all suggestive. Id. at 828-29. Similarly, in 1975, a federal district court in Georgia considered evidence relating to hypnosis and found it to be relevant to credibility and therefore covered by Giglio and Brady. See Emmett v. Ricketts, 397 F. Supp. 1025, 1039-40 (N.D. Ga. 1975). In that case, as in the instant one, there was almost no evidence other than the one witness' testimony that tended to suggest that the defendants were guilty, and the government failed to turn over the records of the hypnosis of that witness. Id. The district court found that "[h]er credibility was the pivotal issue in these cases and the Hall [hypnotist] materials were absolutely essential to a fair appraisal of the credibility of the state's critical witness." Id. at 1040-41. Shingleton and Collins attempt to distinguish Emmett by arguing that the evidence in that case was relevant because the witness had stated, during hypnosis, that someone other than the defendant was responsible for the crime. This is not an accurate assessment of Emmett. In fact, the evidence was relevant because it showed a witness whose story changed greatly over time, and who was particularly influenced by hypnosis; this alone made the court seem very certain that the defense was entitled to the tapes and documents relating to the hypnosis. The court described the evidence as relevant to credibility, not as exculpatory, but still found that it should have been disclosed under Giglio. Id.

Shingleton and Collins next argue that not until the Supreme Court's decision in United States v. Bagley, 473 U.S. 667 (1985), was the right of access to impeachment

evidence clearly established. This is simply not correct. In fact the Bagley court cited Giglio for its rule that impeachment evidence as well as exculpatory evidence is covered by Brady. Id. at 676. Bagley did not create the duty to disclose evidence, but instead merely refined the contours of the rule. The Bagley Court clarified the materiality requirement for reversal for a Giglio violation, and created the rule that "[t]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. at 682. Prior to Bagley, it seems that, if anything, the test for materiality was less stringent and more infractions were found to mandate reversal of a guilty verdict. It cannot be said that, absent Bagley, appellees had no reason to know that evidence regarding identification procedures and hypnosis that cast doubt upon the defendant's guilt should be disclosed to the defense. It is noteworthy that our decision in Jean v. Rice, which resulted in Jean's release from prison, cited Giglio, and not Bagley, for the proposition that the evidence in question should have been disclosed. 945 F.2d at 87 n.9.

Evidence exculpating the defendant, evidence establishing a motive to lie, and evidence of prior inconsistencies in witness statements were all subject to Brady and Giglio's disclosure requirements in 1982. As we ruled in Jean v. Rice, the evidence in Jean's case should, without a doubt, have been turned over to the defense. The documents and tapes reflected numerous inconsistencies in identifications, both over time and between witnesses. The evidence further revealed the victim's inability to select defendant's photo from a lineup until she underwent a very suggestive hypnosis, and showed that the victim had in fact been shown a photo of Jean prior to identifying him in a live lineup when no other members of the lineup had been seen previously. These facts are all obviously relevant to whether Wilson's and Shingleton's identifications of Jean

should have been relied upon by the jury. Likewise, even though the suggestive nature of the hypnosis of Wilson may not have rendered it inadmissible under North Carolina law regarding hypnosis at the time, it still might have inspired doubt in the minds of the jury about the validity of her post-hypnosis recollections. We conclude that, in 1982, appellees were under a clearly defined constitutional duty to disclose evidence relating to the hypnosis to Jean's counsel. Summary judgment of this case on qualified immunity grounds was therefore inappropriate.

C

The third factor in determining whether Jean has shown that Collins and Shingleton are not entitled to qualified immunity is whether a reasonable person in the position of the defendant would have known that his behavior would violate the right at issue. Pritchett v. Alford, 973 F.2d at 312. One specific consideration relevant to this prong in the instant case is whether the officers in fact informed the district attorney about the existence of the evidence. The district attorney denies having had any knowledge of the existence of documentation of the hypnoses until after trial, but Shingleton and Collins state that they informed the prosecutors about the procedures. If the officers did pass on all relevant evidence to the district attorney, then they perhaps fulfilled their duty, and the burden fell to the district attorney to disclose the evidence to Jean's attorney. Questions, such as this one, involved in the third prong of qualified immunity present mixed issues of law and fact and may require trial by a jury or by the district court. We therefore remand so that the district court may address these issues.

IV

Shingleton and Collins raise two additional arguments in their brief challenging both Jean's initial complaint and his appeal. Neither of these arguments is persuasive. The appellees first argue that, as a matter of law, Shingleton is entitled to absolute immunity as a witness and should not be subjected to suit. This argument is without merit. Jean is not suing Shingleton for his testimony and behavior on the stand, but rather for his behavior during the investigation and trial preparation for Jean's trial; therefore, witness immunity does not protect him. The case upon which Shingleton relies for the assertion that even police officers are entitled to immunity from suit when they are witnesses, Briscoe v. LaHue, 460 U.S. 325 (1983), involves suit for the officer's perjury on the stand. The Briscoe Court mentioned in passing that police officers receive only qualified immunity for performance of their duties other than testifying in court. Id. at 342. Despite Shingleton's mischaracterization of Briscoe, that case simply does not suggest that witness immunity protects witnesses from suit for actions other than their courtroom testimony. We are persuaded by the cogent reasoning of one district court which has addressed this issue. Walker v. Tyler Cty. Comm'n, 886 F. Supp. 540, 549 (N.D. W. Va. 1995). In Walker the district court found that a medical examiner was entitled to absolute immunity from civil liability for allegations that he had lied on the stand. Id. However, the court also found that the defendant was entitled to neither prosecutorial nor qualified immunity for withholding exculpatory evidence. Id. at 546-47. Shingleton is similarly not entitled to immunity from suit for his role in this investigation simply because he was later a witness.

Shingleton and Collins finally argue that Jean's claims are time barred, relying upon Brooks v. City of Winston Salem, N.C., 85 F.3d 178, 182-83 (4th Cir. 1996), to support this assertion. Brooks states that claims relating to lack of probable cause for a warrantless arrest begin to accrue at the time of the arrest rather than when the eventual conviction is overturned or dismissed. Id. at 183. However, Brooks specifies that this analysis applies only when the alleged § 1983 violation does not implicate the validity of the conviction or sentence. Id. at 182-83. The Supreme Court in Heck v. Humphrey stated that when the damages are for "unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid," the plaintiff must show that the conviction has been reversed, vacated or otherwise called into question by a court. 114 S.Ct. 2364, 2372 (1994). The cause of action in such cases, therefore, cannot accrue until after the reversal of the underlying conviction. Jean's claim of damage from Brady and Giglio violations did not arise until his criminal case was dismissed, and it is not time-barred.

V

For the foregoing reasons, we reverse the court's grant of summary judgment in favor of Shingleton and Collins, and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED

HAMILTON, Circuit Judge, concurring in the judgment:

The issue presented in this appeal is straightforward: whether, at the time of their conduct, the actions of Shingleton and Collins violated "clearly established

statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). At the time of their actions, Brady and its progeny made clear that a defendant's due process rights were violated when the prosecution failed to disclose material exculpatory or impeachment evidence to the defense, regardless of whether the prosecutor acted in bad faith or even knew of the evidence. See Giglio v. United States, 405 U.S. 150, 153-54 (1972). Although the Supreme Court has not explicitly addressed the disclosure duties of police under Brady, our case law at the time of Shingleton and Collins' actions clearly established that a defendant's due process rights were violated when the police concealed material exculpatory or impeachment evidence. Barbee v. Warden, 331 F.2d 842, 846 (4th Cir. 1964); see also Boone v. Paderick, 541 F.2d 447, 450-51 (4th Cir. 1976) (duty to disclose not "neutralized because [evidence] was in the hands of the police rather than the prosecutor"), cert. denied, 430 U.S. 959 (1977).[1] As the Barbee court explained:

> Nor is the effect of the nondisclosure neutralized because the prosecuting attorney was not shown to have had knowledge of the exculpatory evidence. Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposefully, or negligently, withheld. And it makes no difference if the withholding is by officials

[1]We have recognized that a police officer's failure to disclose exculpatory evidence that should have been disclosed under Brady is cognizable under § 1983. See Carter v. Burch, 34 F.3d 257, 263-64 (4th Cir. 1994) (affirming jury verdict against police officer for withholding exculpatory evidence that should have been disclosed under Brady), cert. denied, 115 S. Ct. 1101 (1995)

> other than the prosecutor. The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure. If the police allow the State's Attorney to produce evidence pointing to guilt without ever informing him of other evidence in their possession which contradicts this inference, state officers are practicing deception not only on the State's Attorney but on the court and the defendant. . . .
>
> The duty to disclose is that of the state, which ordinarily acts through the prosecuting attorney; but if he too is the victim of police suppression of the material information, the state's failure is not on that account excused.

331 F.2d at 846 (footnote omitted).

Accordingly, this case boils down to whether a reasonable officer in Shingleton and Collins' position would have known, when he/they acted, that the exculpatory and impeachment evidence allegedly with held from the prosecutor was material. At the time of Shingleton and Collins' actions, the materiality standard set forth in United States v. Agurs, 427 U.S. 97 (1976), governed. The Court in Agurs distinguished between three situations in which a Brady claim might arise: (1) where the prosecutor introduced testimony that he knew or should have known was false; (2) where the government failed to disclose a specific kind of exculpatory or impeachment evidence requested by the defendant; and (3) where the government failed to disclose exculpatory or impeachment evidence never requested, or requested in a general way. Under the

false testimony standard, the Court noted that it had consistently set aside convictions obtained by the knowing use of false testimony when there was "any reasonable likelihood that the false testimony could have affected the judgment of the jury." Id. at 103 (footnote omitted). Under the specific request scenario, the Court noted that when the government failed to disclose a specific kind of exculpatory or impeachment evidence requested by the defendant, that failure, was "seldom, if ever, excusable." Id. at 106. The Court went on to hold that under the no/general request scenario, the government failed in its duty to disclose when suppression of the evidence would be "of sufficient significance to result in the denial of the defendant's right to a fair trial." Id. at 108. In other words, if the undisclosed evidence created "a reasonable doubt that did not otherwise exist," there was constitutional error. Id. at 112.[2]

In my opinion, at the time of Shingleton and Collins' actions, a reasonable officer would have known that the evidence allegedly withheld would have created "a reasonable doubt that did not otherwise exist." Id. To appreciate and understand the significance of the audio

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[2]The materiality standard was modified in subsequent Supreme Court cases. In United States v. Bagley, 473 U.S. 667 (1985), the Court disavowed any difference between exculpatory and impeachment evidence and abandoned the distinction between the second and third Agurs scenarios. In Bagley, the Court held that evidence was material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. at 682 (opinion of Blackmun, J.); id. at 685 (White, J., concurring in part and concurring in judgment). "A `reasonable probability' is a probability sufficient to undermine confidence in the outcome[of the trial.]" Id. at 682. Following Bagley, the Court has consistently adhered to the Bagley standard. See, e.g., Kyles v. Whitley, 115 S. Ct. 1555, 1566 (1995) ("A 'reasonable probability' of a different result is accordingly shown when the Government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" (quoting Bagley, 473 U.S. at 678)).

recordings and the accompanying reports of the hypnosis of Wilson and Shingleton, it is crucial to recognize that the state's case hinged on the identification of Jean by Wilson and Shingleton. As we recognized in our earlier opinion:

> [T]here was little independent corroborating evidence to sustain Jean's conviction: there were no fingerprints or matching pubic hairs; the blood/semen test only placed Jean in the same 32% as the rapist; and the voice exemplar was of dubious quality, had only one black voice on it, and presented difficulty to Ms. Wilson, causing her to take one week to make her identification.

Jean v. Rice, 945 F.2d 82, 87 (4th Cir. 1991). Because there was little independent evidence of guilt outside the inconclusive identification evidence, a reasonable officer would have known that the audio recordings and accompanying reports of the hypnosis of Wilson and Shingleton would have created "a reasonable doubt that did not otherwise exist." Agurs, 427 U.S. at 112. Indeed, it cannot be denied that the audio recordings and the accompanying reports of the hypnosis of Wilson and Shingleton contained numerous inconsistencies with previous descriptions of the assailant and that the hypnotic techniques were suggestive. For example, as to Shingleton, under hypnosis, the stripe on the t-shirt became a sweatmark, and the mustache disappeared. In addition, Shingleton recalled white shoelaces and striped socks under hypnosis, but Jean's shoelaces were black and his socks had no stripes. Finally, he recalled glassy eyes under hypnosis despite his earlier statement that he could not see the suspect's eyes. Along a similar vein, Wilson's inability to identify Jean as the assailant until after she underwent a very suggestive hypnosis made the audio recordings and the

accompanying reports of the hypnosis all the more critical. All of this evidence not only was critical to impeach the testimony of Wilson and Shingleton, but it strongly suggested that someone else committed the crime. In short, the audio recordings and the accompanying reports of the hypnosis went directly to the heart of the state's case - - whether Jean, as opposed to someone else, committed the crime- - and should have been disclosed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

NO. 4:94-CV-62-H2

LESLY JEAN,
Plaintiff,

v.

DELMA COLLINS, Chief of Detectives of the City of Jacksonville, North Carolina, Individually, and JAMES SHINGLETON, Police Officer with the City of Jacksonville, North Carolina, Police Department, Individually,
Defendants.

ORDER

Entered October 12, 1995

This matter is before the court on defendants' motion for summary judgment. Plaintiff initiated the underlying action in this case on May 20, 1994, alleging damages arising from the violation of his due process and fourth Amendment rights. Plaintiff's complaint also asserts state law claims for negligent and intentional infliction of emotional distress and malicious prosecution. These state law claims were dismissed by the court in an order filed on February 16, 1995. Consequently, the only claims presently before the court are the allegations concerning the plaintiff's

constitutional rights. The parties have thoroughly briefed this matter and the claims are ripe for disposition.

Statement of the Case

On December 5, 1982, the plaintiff, Lesly Jean ("Jean"), was convicted of rape and sexual assault after a trial by jury. Upon exhausting his state court appeals, Jean filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of North Carolina (the "District Court"). The District Court, the Honorable Terrence William Boyle presiding, denied the plaintiff's petition. However, the United States Court of Appeals for the Fourth Circuit (the "Court of Appeals") reversed and remanded the case with instructions that a writ be issued. *Jean v. Rice,* 945 F.2d 82 (4th Cir. 1991). Upon remand, the prosecution decided not to retry the case and Jean was subsequently released from prison.

Jean's habeas corpus petition was granted by the Court of Appeals on the grounds that audio tapes and accompanying records of hypnotically induced testimony "should have been disclosed to defense counsel, and that the government's failure to do so was a violation of the principles announced in Brady and its progeny." *Id.* at 87. The specific facts upon which this conclusion was based are thoroughly set forth in the Court of Appeals' opinion referenced above. These facts are also summarily repeated in this court's earlier order of February 16, 1995, denying in part and granting in part the defendants' motion to dismiss. Consequently, although the facts are important to the disposition of this matter, the court feels that they have been sufficiently expressed in the previous two orders and for that reason they will not be repeated here.

DISCUSSION

Jean's present action was initiated on May 20, 1991, pursuant to 42 U.S.C. § 1983. Jean claims the same actions that were found to warrant habeas corpus relief also entitle him to monetary damages under § 1983. Jean's first claim for relief is premised upon the due process clause. His second claim for relief is premised upon an alleged lack of probable cause under the Fourth Amendment. The defendants, sued in their individual capacity for actions committed as employees of the City of Jacksonville, assert that they are entitled to summary judgment based on the defense of qualified immunity.

1. Summary Judgment

Summary Judgment is appropriate when there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby,* Inc., 477 U.S. 242, 247 (1986). The party seeking summary judgment bears the burden of initially coming forward and demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Ross* v. *Communications Satellite Corp,* 759 F.2d 355, 364 (4th Cir. 1985). When making the summary judgment determination, the facts and all reasonable inferences must be viewed in the light most favorable to the non-movant. *Anderson*, 477 U.S. at 255.

Once the moving party has met its burden, the nonmoving party must then affirmatively demonstrate that there is a genuine issue of material fact which requires trial. *Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. *Anderson,* 477 U.S. at 250. The moving party can bear his burden

either by presenting affirmative evidence, or by demonstrating that the non-movant's evidence is insufficient to establish his claim. *Celotex Corp.*, 477 U.S. at 331 (Brennan, J., dissenting).

2. Qualified Immunity

Public officials, sued for damages in their individual capacities, may be entitled to summary judgment on the basis of qualified immunity. Such officials "generally are shielded from liability for damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). The test for determining the availability of the qualified immunity defense is the "objective reasonableness" of the official's actions. *Anderson v. Creighton,* 483 U.S. 635, 639 (1987). Although it is not necessary for the right asserted to have been recognized in the precise factual context, the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right." *Id.* at 640. *See also Slattery v. Rizzo*, 939 F-2d 213, 216 (4th Cir. 1991) ("The right of the plaintiff must be established so clearly that a reasonable official would know what he is doing violates that right.")

In light of the qualified immunity standard discussed above, the question presently before the court is whether Jean's now established right to hypnotized testimony and related records was clearly established under the particular circumstances confronting the defendants at the time of their questioned actions. *See Slattery,* 939 F.2d at 216. The court must therefore begin its analysis by looking to the law regarding hypnotized testimony as it existed in 1982, the date of Jean's trial.

3. Was Hypnosis an Accepted Investigation Technique in 1982?

In 1982, hypnosis appears to have been a generally accepted method of police investigation in North Carolina. In fact, it was not until 1984 that the North Carolina Supreme Court ruled that hypnotically refreshed testimony was inadmissible in court. *State v. Peoples,* 311 N.C. 515, 319 S.E.2d 177 (1984). Moreover, the Court of Appeals has not yet adopted a *per se* rule against the admissibility of such testimony and presently allows the testimony as long as certain safeguards are met. *Harker v. Maryland,* 800 F.2d 437 (4th Cir. 1986).

In a sworn affidavit attached to the motion for summary judgment, defendant Shingleton states that at the time of Jean's investigation he and other law enforcement officials thought hypnosis to be "highly effective." Aff. at 3. Defendant Collins states, also in a sworn affidavit, that he had received extensive hypnosis training from the State of North Carolina at its Justice Academy in Salemburg. Aff. at 1. Collins also discusses other hypnosis he had performed and the fact that hypnosis appeared to him to be a regularly accepted scientific method of police investigation. Aff. at 1-3.

In light of the sworn statements of the two defendants, it appears to this court that the defendants had no reason to question their use of hypnosis as an investigative technique. It also seems, highly unlikely that the Justice Academy would train its officers in hypnosis if hypnosis was not commonly accepted at the time. The court therefore finds that both Collins and Shingleton were reasonable in believing that hypnosis could properly be used to aid them in their investigation of Jean. The question still remains, however, whether the defendants should have known that hypnotically induced testimony and related records were the type of evidence subject to disclosure to the defense.

4. Should the Defendants Have Known in 1982 that Hypnosis Testimony and Related Records Needed to be Made Available to the Defense?

As of 1982, the primary case regarding the suppression of evidence was the United States Supreme Court case of *Brady v. Maryland,* 373 U.S. 83 (1963). In Brady, the Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." Id. at 86. It was not until 1985, however, that the Supreme Court expanded upon its *Brady* decision so as to make clear that impeachment evidence, as well as exculpatory evidence, falls within the parameters of evidence that must be made available to the defense. *U.S. v. Bagley,* 473 U.S. 667 (1985).

In *Bagley,* the Supreme Court noted that *Brady* involved a situation in which 'the prosecution failed to disclose exculpatory evidence. In the present case, the prosecutor failed to disclose evidence that the defense might have used to impeach the Government's witnesses." *Id.* at 676. The Court then stated, "suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial . . . only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." *Id.* at 678. The Court ultimately concluded that under the facts *of Bagley,* "the Government's failure to assist the defense by disclosing information that might have been helpful in conducting the cross-examination" constituted constitutional error. Id. at 678.

The Court's decision in *Bagley,* that the prosecution's failure to disclose impeachment evidence constituted constitutional error, was not a foregone conclusion. In fact, it was only after a thorough discussion of the issue and the particular facts of the case before it that the Court concluded as it did. In the matter presently before the court, the

hypnotically induced testimony and related records are clearly impeachment rather than exculpatory evidence. This court has stated before, and the Court of Appeals makes clear in its opinion, that the hypnosis testimony and accompanying records in no way exculpated Jean; rather, they were found to be material because of their potential as a means of discrediting and impeaching the testimony of the victim and defendant Shingleton. *Jean*, 945 F.2d at 87; Order at 5 (E.D.N.C. February 16, 1995). The evidence therefore falls under the rule of *Bagley* rather than *Brady*. As *Bagley* was not decided until 1985, it is apparent to this court that it was not "clearly established" in 1982 that impeachment materials were subject to disclosure.

Moreover, the question before the court today is not whether it was clear in 1982 that impeachment materials *in general* should be turned over to the defense. Rather, the question before the court is whether it was clearly established in 1982 that the hypnotized testimony and related records *of this case* were subject to disclosure under the particular circumstances confronting the defendants at the time of their questioned actions. *See Slattery v. Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991). The *Bagley* decision itself requires one to forecast the effect of the evidence on the trial. In addition, both the Supreme Court of North Carolina and Judge Boyle found no constitutional error in the defendants' actions. *See State v. Jean,* 310 N.C. 157, 311 S.E.2d 266 (1984); *Order* (E.D.N.C. July 6, 1990). If the state supreme court and a learned district court judge found that even under *Bagley* the withholding of hypnotically induced testimony and accompanying records was not a constitutional violation, then certainly the issue cannot be considered clearly established among non-lawyer police authorities before *Bagley* was even decided. It is therefore abundantly clear to this court that it was far from clearly established in 1982 that the materials withheld by the defendants should have been given to Jean's lawyers. Consequently, the court finds that

the defendants have successfully asserted the defense of qualified immunity against Jean's claim that their actions violated his due process rights.[1]

5. The Fourth Amendment Claim

The plaintiff's second claim for relief is premised upon the Fourth Amendment. The Fourth Amendment affords a citizen the right to be free from arrest without probable cause and to be free from unreasonable search and seizure. The standard for determining probable cause "is not defined by bright lines and rigid boundaries." *U.S. v. Williams,* 974 F.2d 480, 481 (4th Cir. 1992). Courts generally describe probable cause as "facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Michigan v. DeFillippo,* 443 U.S. 31, 37 (1979). However, the probable cause standard does not require that an officer's belief "be correct or more likely true than false." *Williams,* 974 F.2d at 481.

In applying the defense of qualified immunity to the Fourth Amendment, it has been established that qualified immunity shields an officer from a suit for damages if a reasonable officer could have believed a party's arrest to be lawful, in light of clearly established law and the information in the officer's possession. *Hunter v. Bryant,* 502 U.S. 224, 226 (1991). Furthermore, "[e]ven law

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[1]It should also be noted that the defendants did discuss the fact of the hypnosis with the Assistant District Attorney in the case. Also, plaintiff admits that the defendants themselves were never served with any subpoenas or document requests. The nondisclosure of the materials to the plaintiff's lawyer was therefore a prosecutorial decision. Although this does not make the defendants blameless, it does show that they were acting in a manner they thought proper at the time.

enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity." *Id.* (quoting *Anderson v. Creighton,* 483 U.S. 635, 641 (1987). Thus, [t]he qualified immunity standard gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* at 537 (quoting *Malley v. Briggs,* 475 U.S. 335, 341 (1986)).

The plaintiff in the matter presently before the court appears to be claiming that he was arrested without probable cause because his identification as a suspect was due in part to an officer's hypnotically induced description. As this court has already stated in its previous order dismissing the plaintiff's malicious prosecution claim, "the wrong upon which Jean relies, suppression of tapes and records of hypnosis, would have provided a basis for attacking the credibility of the hypnotically refreshed identifications. In other words, it weakened, but did not contradict, the circumstances creating probable cause." *Order* at 6 (E.D.N.C. February 16, 1995).

Although the above quoted statement was made in the context of probable cause to prosecute, the court finds the statement to be equally true in the context of probable cause for arrest. Prior to the plaintiff's arrest, the rape victim had given a non-hypnotically induced description of her attacker. A composite drawing of the suspect was subsequently created, reproduced and circulated throughout the police station. That same morning, defendant Shingleton stopped a man who fit the victim's description. Although the man fled, defendant Shingleton was able to view the man's features in the light from his squad car Shingleton was later hypnotized whereupon he was able to give a more complete description of the man he had stopped. Shingleton's description was similar to that of the victim.

Five days after the rape incident, two police officers spotted the plaintiff at a doughnut shop. Believing the

plaintiff to match the description of the victim's attacker, these officers detained Jean and called Shingleton for an identification. When Shingleton arrived, he positively identified Jean as the man he had stopped. Only then was Jean arrested and taken into custody.

Just as the fact of the hypnosis does not negate probable cause to prosecute, the fact that Shingleton had been hypnotized does not negate the fact that the officers who arrested Jean had enough probable cause for his arrest. The victim herself had not yet been hypnotized and it was from her description alone that the composite was drawn. Furthermore, although hypnotized testimony may no longer be acceptable in North Carolina's state courtrooms, this certainly does not mean that hypnotized testimony cannot be toed to establish probable cause. It is a recognized principle of jurisprudence that the function served by evidence in a criminal trial is very different from the function that same evidence may serve in making a preliminary determination of probable cause. *See generally, U.S. v. Harris,* 403 U.S. 573, 582 (1971). Certainly it is not the plaintiff's contention that only evidence that would be admissible at trial can be used to establish probable cause. Thus, even though Shingleton, who had been hypnotized on a prior occasion, helped to identify Jean, the court finds that the facts and circumstances within the officers' knowledge were sufficient to warrant a reasonable person to believe that Jean had committed the offense.

CONCLUSION

In 1991, Lesly Jean was set free after being convicted of rape and sexual assault. The reason for his release was the prosecutor's failure to turn over to Jean's attorney evidence relating to hypnotically induced testimony and related records. Lesly Jean now seeks monetary damages from the defendants, two policeman involved in his investigation, for

the same failure to disclose evidence. This court finds, however, that while it was a denial of Jean's constitutional rights for the evidence to have been withheld, *see Jean v. Rice*, 945 F.2d 82 (4th Cir. 1991), Jean is not now able to recover monetarily from Detective Collins or Officer Shingleton as these officers are properly shielded from such responsibility under the principle of qualified immunity. Accordingly, the court hereby GRANTS the defendants' motion for summary judgment. This action is therefore DISMISSED and the clerk is directed to close this case.

This 13th day of October, 1995.

/s/ Malcolm J. Howard
MALCOLM J. HOWARD
United States District Judge

At Greenville, NC
#13

United States District Court
EASTERN DISTRICT OF NORTH CAROLINA

LESLY JEAN,
Plaintiff,

v.

DELMA COLLINS, Chief of Detectives of the City of Jacksonville, North Carolina, Individually, and JAMES SHINGLETON, Police Officer with the City of Jacksonville, North Carolina, Police Department, Individually,
Defendants.

JUDGMENT IN A CIVIL CASE
CASE NUMBER:
4:94-cv-62-H2

Entered: October 13, 1995

____ **Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.**

XX **Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.**

IT IS ORDERED AND ADJUDGED the defendants' motion for summary judgment is granted and this case is closed.

THE ABOVE JUDGMENT ENTERED TODAY, OCTOBER 13,1995 AND COPIES MAILED TO

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October 13, 1995
Date

David W. Daniel, Clerk
Clerk

/s/ Lisa W. Lee
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WILMINGTON DIVISION

NO. 4:94-CV-62-H2

LESLY JEAN,
Plaintiff,

vs.

DELMA COLLINS, Chief of Detectives of the City of Jacksonville, INDIVIDUALLY, and JAMES SHINGLETON, Police Officer with the City of Jacksonville, North Carolina, Police Department, INDIVIDUALLY,

Defendants.

COMPLAINT

I. PRELIMINARY STATEMENT

1. This is an action for damages sustained by a citizen of the United States, LESLY JEAN, against DELMA COLLINS, chief of detectives of the City of Jacksonville, North Carolina, Police Department and JAMES SHINGLETON, a police officer, of the police department of the CITY OF JACKSONVILLE, NORTH CAROLINA, for damages arising from the malicious prosecution and false arrest of plaintiff Lesly Jean and

violations of Lesly Jean's due process rights through suppression and withholding of exculpatory evidence and his Fourth Amendment Right to be free from arrest without probable cause and unreasonable seizure. Supplemental state tort claims of intentional infliction of emotional distress, malicious prosecution, intentional infliction of emotional distress or alternatively, negligent infliction of emotional distress are also stated.

II. JURISDICTION AND VENUE

2. Jurisdiction of this Court is invoked under the provisions of §§ 1331 and 1343(3) of Title 28 §§ 1983 and 1988 of Title 42 of the United States Code and under the supplemental jurisdiction of this Court with respect to the causes of action under state law sounding in tort.

3. The unlawful acts and practices alleged below were all committed within the Eastern District of North Carolina.

III. PARTIES

4. Plaintiff, LESLY JEAN, is a citizen and resident of the United States residing in Jamaica, New York. At the time of the events set forth below, plaintiff was a Lance Corporal in the United States Marine Corps, stationed at Camp Lejeune, Jacksonville, North Carolina.

5. Upon information and belief, Defendant, DELMA COLLINS, (hereafter COLLINS), is a citizen and resident of the United States residing in Onslow County, North Carolina, and at all times relevant thereto, was a duly authorized police officer and chief of detectives, employed by the CITY OF JACKSONVILLE, NORTH CAROLINA, performing law enforcement duties on behalf of CITY OF JACKSONVILLE, NORTH CAROLINA, including enforcement of the laws of the State of North Carolina. At

all relevant times, the Defendant COLLINS was acting in such capacity as the agent, servant and employee of the CITY OF JACKSONVILLE, NORTH CAROLINA. This defendant is sued individually.

6. Upon information and belief, Defendant, JAMES SHINGLETON, (hereafter SHINGLETON), is a citizen and resident of the United States residing in Onslow County, North Carolina, and at all times relevant thereto, was a duly authorized police officer, employed by the CITY OF JACKSONVILLE, NORTH CAROLINA, performing law enforcement duties on behalf of the CITY OF JACKSONVILLE, NORTH CAROLINA, including enforcement of the laws of the State of North Carolina. At all relevant times, Defendant SHINGLETON was acting in such capacity as the agent, servant and employee of the CITY OF JACKSONVILLE, NORTH CAROLINA. This defendant is sued individually.

7. During all times mentioned in this Complaint, defendants were acting under color of law, that is, under color of the Constitution, statutes, laws, rules, regulations, customs and usages of the State of North Carolina.

8. During all times mentioned in this Complaint, defendants engaged in acts and omissions constituting a deprivation of the Constitutional Rights, privileges and immunities of the plaintiff and, while these acts were carried out under color of state law, they had no justification or excuse in law, and were instead illegal, improper and unrelated to any activity in which defendants may appropriately and legally engage in the course of their respective offices.

IV. FACTUAL ALLEGATIONS

9. On or about July 21, 1982, Ms. Alice "Kathy" Wilson was raped and sexually assaulted by an attacker whom she described as black, five feet eight inches tall, muscular, weighing about 165 or 170 pounds, with a close-cut marine haircut, kinky hair, and no facial hair. He wore dark shorts, white crew socks and high-top sneakers. Ms. Wilson did not realize that her attacker was black until he told her.

10. Later on the aforesaid date, Defendant Shingleton stopped a man walking along the highway toward Camp LeJeune who fit the description of Wilson's assailant. After questioning the man for about one and one half minutes, the man fled into neighboring woods.

11. Defendant Shingleton described the person as a black male, possibly having a beard or mustache, close-cut hair, about five feet ten inches tall, 170 pounds, wearing blue shorts, a blue shirt with writing, white knee socks and white high-top tennis shoes.

12. On or about July 22, 1982, Wilson met with police officials to create a composite drawing of the suspect. At this meeting, Wilson added to her description that her attacker had small freckles scattered over his upper face as well as a large spot on his left cheek, approximately the size of a dime.

13. No composite drawing was produced based on Shingleton's description because the encounter had been too brief, the lighting too poor, and his description too vague.

14. Because of the shortcomings in Defendant Shingleton's description, Defendant Collins hypnotized defendant Shingleton on July 22, 1982.

15. Defendant Collins' only training in hypnosis had been at a two week course at the North Carolina Justice Academy.

16. During said hypnotic session, defendant Shingleton's description of the suspect he stopped changed from his previous description. The design on the tee shirt became a sweat mark and the man was clean shaven with a baby-face, oval jaw, big lips, big nose, glassy eyes, blue stripes on his socks, white shoelaces, and the word "Nike" written on the sneakers.

17. Defendant Collins audio taped the actual hypnosis, but did not tape the pre- and post-hypnotic conversations. Defendant Collins did not record his own knowledge of the case, nor did he record Shingleton's pre- and post-hypnotic knowledge.

18. As a result of the hypnosis, investigating officers concluded that defendant Shingleton's description matched the one given by Wilson.

19. On July 26, 1982, two police officers spotted plaintiff at a Dunkin' Donuts restaurant, near Wilson's home. Believing plaintiff matched the description, they detained plaintiff and radioed defendant Shingleton. Shingleton arrived and positively identified plaintiff as the man he had stopped. Plaintiff was taken into custody, photographed and fingerprinted.

20. By plaintiff's consent, his marine locker was searched. Defendants removed a blue tee shirt, blue pair of shorts with a white border and white stripes on each side, and a pair of white high-top basketball sneakers with the Nike name and logo inscribed in black with black laces in the sneakers.

21. On July 27, 1982, Wilson viewed a photo line-up, which included plaintiff's picture. Wilson could not identify any of the subjects as her assailant.

22. On July 28, 1982, Wilson returned to the police station because one of the pictures made her "feel sick." She selected plaintiff's photo as the one that made her "feel sick," and the photo of another subject as looking "kind of haunty." She further stated "I don't think any of these are him."

23. During said visit to the police station on July 28, 1982, police showed Wilson the clothes that had been removed from plaintiff's locker, but she did not recognize them.

24. On July 30, 1982, Defendant Collins hypnotized Wilson to improve her memory of why the picture made her feel sick. He asked Wilson if she had ever seen the person in the photo that made her ill, she replied that she did not know.

25. During the aforesaid hypnosis, Defendant Collins asked Wilson if said picture and the rapist looked the same, especially the eyes and shape of face. Wilson said yes, associating plaintiff as her rapist during hypnosis where she had not done so at any time prior to hypnosis.

26. Defendant Collins audio taped only the actual hypnosis of Wilson and filled out a "Pre-Hypnosis Information Worksheet," briefly listing the characteristics of the assailant that Wilson was able to describe at that time. After the hypnotic session, Defendant Collins filled out a "During Hypnosis Information Worksheet," circling the items of "new information" as (1) a description of the assailant's eyes as grey, (2) possible Puerto Rican accent, (3) Nike emblem on his shoes, and (4) white shoelaces.

27. On August 3, 1982, Jacksonville police made a voice exemplar tape, which included plaintiff's voice, along with four other voices. Plaintiff had a creole accent, two of the other voices had northern United States accents, one had a Guamanian accent and the other a Puerto Rican accent. Plaintiff's was the only black voice on said voice exemplar.

28. Wilson listened to said voice exemplar tape and stated that the plaintiff's voice and the Puerto Rican voice sounded similar to the voice of her assailant, but could not make a positive identification. Wilson called the Jacksonville police one week later and without having listened to the tapes again, purported to identify plaintiff's voice as that of her assailant.

29. On September 17, 1982, Jacksonville police had Wilson view a three man line-up which consisted of plaintiff and two other black men; one taller and the other shorter than plaintiff. Neither of the other two black men had a military haircut and plaintiff's face was the only one which appeared in each photo identification as well as the live line-up. During said live line-up Wilson positively identified plaintiff as her assailant.

30. In October, 1982, plaintiff was indicted on charges of rape and sexual assault.

31. Despite timely and appropriate motions for discovery by plaintiff's criminal defense counsel, the state did not disclose, and upon information and belief was not advised by defendants, that the two key witnesses for the state had been hypnotized or that various records pertaining to the hypnosis and identification procedures existed. It is further alleged that said information was intentionally suppressed and withheld by defendants.

32. Plaintiff's criminal defense counsel did not learn of the hypnosis until after the trial had already started and after Wilson had already testified on direct examination. Defense counsel requested any recordings that might exist, but the state did not provide its records or tapes. Plaintiff's defense counsel did not have the recordings to help contradict the witnesses' testimony or to demonstrate the pervasive procedural flaws in the hypnosis.

33. The state's evidence consisted of plaintiff's sneakers, shorts and tee shirt, a blood/semen test that placed him in the same 32% of the population as the rapist,

and the identification testimony of Wilson and defendant Shingleton, who both identified plaintiff at trial.

34. At trial plaintiff offered four alibi witnesses including three marines who testified that they saw plaintiff in the barracks at the Camp LeJeune Marine Base at the time the victim was assaulted, and his platoon commander testified that he was required to be on duty at that time, and if he had not been present, there would have been a record of his absence, which there was not.

35. On December 5, 1982, the jury returned a guilty verdict on all counts and plaintiff was sentenced to and imprisoned for two consecutive life terms.

36. It was not until long after the trial and the appeal that plaintiff's defense counsel obtained from the Jacksonville police, through discovery procedures in a federal habeas corpus lawsuit, the tape recordings, documents and witness testimony indicating that the witnesses would never have identified plaintiff if it had not been for the hypnosis.

37. On May 22, 1991, the United States Court of Appeals for the Fourth Circuit held that the records and tapes requested by plaintiff's defense counsel were material; had they been disclosed to the defense, the result of the proceeding would have been different; and the failure to furnish the records and tapes requested by plaintiff's criminal defense counsel was constitutionally prejudicial. Jean v. Rice, 945 F.2d 82 (4th Cir. 1991). As a result, plaintiff's case was remanded with instructions to issue a writ of habeas corpus, that plaintiff be retried or released.

38. Following the Court's ruling, the District Attorney for Onslow County determined that there was insufficient evidence to present to a jury and all charges were dismissed against plaintiff.

V. FIRST CAUSE OF ACTION

(4th AMENDMENT CLAIM PURSUANT TO 42 U.S.C. §1983).

39. The allegations of paragraph 1 through 37 of this Complaint are incorporated herein by reference.

40. At the time of plaintiff's arrest, he had committed no criminal offense for which he could have been lawfully arrested.

41. Plaintiff's arrest and incarceration by defendants were without probable cause. Furthermore, the actions of defendants in withholding exculpatory evidence, resulting in the plaintiff's criminal conviction and incarceration, as well as defendant Collins' failure to conduct the alleged hypnosis sessions in conformity with any acceptable standards of practice and with no established safeguards, independently and in combination, violated plaintiff's civil rights.

42. All of the acts alleged in this Complaint were committed by the defendants in a willful, wanton and reckless manner with a deliberate disregard for the plaintiff's constitutional rights, specifically his rights to be secure as a person against unreasonable seizure and to be free from arrest without probable cause as set forth in the 4th and 14th Amendments to the United States Constitution.

43. The laws and rights violated by the defendants were clearly established as of July 21, 1982, and any reasonable government officer would have known of these laws and of his legal obligation to protect plaintiff's rights.

44. As a direct and proximate result of the foregoing acts and conduct of the defendants, plaintiff was illegally and unconstitutionally incarcerated and imprisoned for over nine (9) years leading to extraordinary mental pain and suffering and necessitating current professional care for plaintiff. The actions of defendants conspired to deprive plaintiff of his freedom, liberty and a significant portion of his life.

VI. SECOND CLAIM FOR RELIEF

(THE 14TH AMENDMENT, SUBSTANTIVE DUE PROCESS CLAIM PURSUANT TO 42 U.S.C § 1983).

45. The allegations of paragraphs 1 through 37, 39 and 40 of this Complaint are incorporated herein by reference.

46. All of the acts alleged in this Complaint were committed by the defendants in a willful, wanton and reckless manner with a deliberate disregard for the plaintiff's constitutional rights, specifically his right to due process of law as set forth in the 14th Amendment to the United States Constitution.

47. The laws and rights violated by the defendants were clearly established as of July 21, 1982, and any reasonable government officer would have known of these laws and of his legal obligation to protect plaintiff's rights.

48. As a direct and proximate result of the foregoing acts and conduct of the defendant, plaintiff was illegally and unconstitutionally incarcerated and imprisoned for over nine (9) years leading to extraordinary mental pain and suffering and necessitating current professional care for plaintiff. The actions of defendants conspired to deprive plaintiff of his freedom, liberty and a significant portion of his life.

VII. THIRD CLAIM FOR RELIEF

(SUPPLEMENTAL CAUSE OF ACTION FOR MALICIOUS PROSECUTION).

49. The allegations of paragraphs 1 through 37 and 39 of this Complaint are incorporated herein by reference.

50. At the time of and following plaintiff's arrest, defendants instituted or caused to be instituted against the plaintiff, criminal proceedings resulting in his arrest, conviction and incarceration.

51. The criminal proceedings were instituted against plaintiff with malice and without probable cause, and in reckless disregard of plaintiff's rights.

52. The criminal proceedings terminated in plaintiff's favor by the dismissal of all charges against him following the United States Court of Appeals for the Fourth Circuit's decision issuing a writ of habeas corpus for the defendants' violation of plaintiff's due process rights under Brady v. Maryland, 373 U.S. 83 (1963).

53. As a proximate result of defendants' malicious prosecution of plaintiff, plaintiff sustained great mental and emotional distress, the deprivation of his freedom, the loss of income and job opportunities, physical pain and suffering, embarrassment, humiliation and other injuries all to his damage.

54. Because of the willful and outrageous nature of the individual defendants' actions, plaintiff is entitled to recover punitive damages in an amount to be determined by the trior of fact.

VIII. FOURTH CLAIM FOR RELIEF

(SUPPLEMENTAL CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS).

55. The allegations of paragraphs 1 through 37 and 39 of this Complaint are incorporated herein by reference.

56. The aforesaid conduct of defendants constitutes extreme and outrageous conduct indicating a reckless indifference to the likelihood that such conduct would cause plaintiff severe emotional distress.

57. Defendants' conduct in fact caused severe mental and emotional distress to plaintiff.

58. As a proximate result of said defendants' intentional infliction of emotional distress, plaintiff has suffered severe emotional harm and mental distress embarrassment, humiliation, pain and suffering, all to his damage.

59. As a direct and proximate result of defendants' above-described actions, plaintiff has suffered such severe mental distress that it has necessitated psychiatric intervention and institutionalization to assist him in overcoming his mental anguish, distress and anxiety.

60. For the outrageous nature of defendants' conduct, plaintiff is entitled to recover punitive damages from the individual defendants in amount to be determined by the trior of fact.

IX. FIFTH CLAIM FOR RELIEF

(SUPPLEMENTAL CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS).

61. The allegations of paragraphs 1 through 37 and 39 of this Complaint are incorporated herein by reference.

62. The accusation, allegations and actions of defendants leading to the arrest and incarceration of plaintiff without probable cause and in violation of plaintiff's constitutional rights previously delineated, were made negligently, recklessly and with a conscious disregard for the true facts and have as their natural and probable consequence the infliction of severe emotional and mental distress on the plaintiff.

63. The mental distress suffered by plaintiff, caused by the conduct of defendants, was so severe that no reasonable person would be expected to have endured defendants' accusations, allegation and actions.

64. As a proximate result of said defendants' negligent infliction of mental distress, plaintiff has suffered severe emotional harm and mental distress, embarrassment, humiliation and pain and suffering all to his damage.

65. As a direct and proximate result of defendants' above-described actions, plaintiff has suffered such severe mental distress that it has necessitated psychiatric intervention and institutionalization to assist him in overcoming his mental anguish, distress and anxiety.

66. For the outrageous nature of defendants' conduct, plaintiff is entitled to recover punitive damages from the individual defendants in an amount to be determined by the trior of fact.

WHEREFORE, plaintiff prays the Court for judgment against defendants as follows:

1. For the first claim for relief, a sum in excess of $10,000.00 for compensatory damages and a sum in excess of $10,000.00 for punitive damages;
2. For the second claim for relief, a sum in excess of $10,000.00 for compensatory damages and a sum in excess of $10,000.00 for punitive damages;
3. For the third claim for relief, a sum in excess of $10,000.00 for compensatory damages and a sum in excess of $10,000.00 for punitive damages;
4. For the fourth claim for relief, a sum in excess of $10,000.00 for compensatory damages and a sum in excess of $10,000.00 for punitive damages;
5. For the fifth claim for relief, a sum in excess of $10,000.00 for compensatory damages and a sum in excess of $10,000.00 for punitive damages;
6. For the costs of this action, including a reasonable attorney's fee;
7. A trial by jury on all issues in this case is hereby demanded;
8. Such other and further relief as the Court may deem appropriate under the pleadings and facts of this case.

RESPECTFULLY SUBMITTED, this 20th day of May, 1994.

BEAVER, HOLT, RICHARDSON, STERNLICHT, BURGE & GLAZIER, P.A.

BY: /s/ Richard B. Glazier
RICHARD B. GLAZIER
State Bar No.: 9817

BY: /s/ Rebecca J. Britton
REBECCA J. BRITTON
State Bar No.: 18934
Attorneys for Plaintiff
806 Hay Street
P. O. Box 53729
Fayetteville, NC 28305
Telephone: (910) 323-4600

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the district of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WILMINGTON DIVISION
FILE NO.: 4:94-CV-62-H2

LESLY JEAN,
Plaintiff,

v.

DELMA COLLINS, Chief of Detectives of the City of Jacksonville, North Carolina, Individually, and JAMES SHINGLETON, Police Officer with the City of Jacksonville, North Carolina, Police Department, Individually,
Defendants.

AFFIDAVIT OF LESLY JEAN

NOW COMES, Lesly Jean, after first being duly sworn, deposed and says the following:

1. I am a resident and citizen of the United States residing in Brooklyn, New York and I am the Plaintiff in the above-captioned lawsuit.

2. In July of 1982, I was a Lance Corporal in the United States Marine Corps, stationed at Camp Lejeune, Jacksonville, North Carolina.

3. On July 21, 1982, between 3:00 and 4:15 a.m., I was on duty at Camp Lejeune, I was not at the home of Alice Kathleen "Kathy" Wilson when she was raped and sexually assaulted.

4. On July 26, 1982, I was at a Dunkin Donuts near Camp Lejeune when I was detained by two officers who believed I matched the description of a rape suspect. The officers called another officer, Officer Shingleton, who came to the scene and identified me as a suspect. I was taken into custody, photographed and fingerprinted.

5. I consented to a search of my Marine locker. The police removed some of my clothes consisting of a blue tee shirt, a blue pair of shorts with a white border and white stripes on each side, and a pair of white high top basketball sneakers with the Nike name and logo inscribed in black and black shoelaces. Shortly after the search of my locker, I was released.

6. On August 3, 1982, I consented to the police recording my voice for a voice exemplar. I was born in Haiti and spent part of my life there so I have a creole accent.

7. On September 17, 1982, the Jacksonville police put me in a three man lineup with two other black men, one shorter and one taller than I. Neither of the other two men had a military haircut. At this time, Ms. Wilson allegedly identified me as her assailant.

8. In October Of 1982, I was indicted for rape and sexual assault.

9. I pled not guilty to the charges against me. I did not rape or sexually assault Ms. Kathy Wilson and am not guilty of any of the crimes for which I was prosecuted.

10. The evidence against me at trial consisted solely of my sneakers, shorts and tee shirt, a blood/semen test that put me in the same 32% of the population as the rapist, and primarily the identifications of Ms. Wilson and Officer Shingleton. I offered four alibi witnesses, including three marines who saw me in the barracks at the time of the assault and my Platoon Commander, who testified that I was required to be on duty at the time of the assault and if I had not been on duty, there would have been a record of my absence, which there was not.

11. On December 5, 1982, the jury returned a verdict of guilty and sentenced me to imprisonment for two consecutive life terms.

12. At the time of my arrest, and at all times prior to Kathy Wilson's testimony at my trial, I did not know that Ms. Wilson and Officer Shingleton were hypnotized by Captain Collins. The District Attorney told my attorney, Ms. Thomasine Moore, at trial that both witnesses were hypnotized and my attorney then asked questions of both about their hypnosis.

13. When Ms. Moore and I learned that Ms. Wilson and Officer Shingleton were hypnotized, Ms. Moore requested any recordings or written records of the hypnosis sessions. The state did not give me or my attorney any records of the hypnosis at any time before or during my trial.

14. I did not know until after my conviction that Ms. Wilson may have first identified me as her attacker while under hypnosis and not in any prior identification attempts.

15. I was also not aware, until after my conviction, that officer Shingleton's description of the suspect he identified changed substantially under hypnosis. I did not know that Officer Shingleton's original description noted a stripe on the shirt, which changed to a sweatmark under hypnosis, or that under hypnosis the suspect's mustache disappeared entirely. I also did not know that, under hypnosis, Officer Shingleton recalled white shoelaces, striped socks, and shorts with no stripes, all of which differed from the clothes found in my locker. I also did not know that Officer Shingleton recalled glassy eyes, under hypnosis, but in his deposition testimony stated that he could not see the suspects eyes clearly.

16. At no time before or during my trial did I or my attorney receive copies of the Pre and Post hypnosis Worksheets completed by Captain Collins when he hypnotized Ms. Wilson.

17. After Appeals to the North Carolina courts and a Habeas Corpus Petition to the United States District Court, on May 22, 1991, the United States Court of Appeals for the Fourth Circuit granted my Habeas Corpus Petition finding that the failure of the state to disclose the records of the hypnosis sessions and prior identification attempts to me and my attorneys was constitutionally prejudicial to my case. As a result, my case was sent back to Onslow County Superior Court with instructions that I be retried or released. After my case was sent back, the Onslow County District Attorney determined insufficient evidence existed to retry my case and all the charges against me were dismissed.

18. In July of 1991 I was released from prison. I moved to Jamaica, New York to live with my stepmother. While living there I did not have a steady job and had a hard time adjusting to normal life after nine years in prison. During that time, I became addicted to alcohol. In April of 1994, I was committed to a state mental hospital in New York for treatment.

19. On May 9, 1994, I was moved to the Creedmoor Alcoholism Treatment Center in Queens Village, New York. I completed an alcohol rehabilitation program on July 5, 1994.

20. After completing the program at Creedmoor, I was referred to an aftercare program at Project Re-Newal Half-way House in Brooklyn, New York, where I now reside and will remain until July 6, 1995.

21. At project Re-Newal, I live in a shelter environment, sharing meals and facilities with about 24 other men. I have very little privacy. I work each day, beginning at 4:30 in the morning, as sanitation worker in Manhattan, cleaning up the Times Square area. My income is sent directly to the shelter and I am given about $120.00 a week for personal expenses like transportation, entertainment, and some clothes. I also attend group therapy sessions where I

am able to discuss the pain and humiliation of spending nine years in prison for crimes I did not commit.

22. After I leave Project Re-Newal in July I plan to attend technical school and open my own building maintenance business. I also hope to be able to receive my honorable discharge from the Marine Corps.

23. Through this affidavit, I also incorporate by reference and verify all of the allegations pled in paragraphs 1-66 of my complaint filed in this action on May 20, 1994 in this Court. In this regard, I have read all of the paragraphs of my Complaint, knowing the contents thereof; and the same are true to the best of my own knowledge, except as to those matters and things alleged on information and belief, and as to those matters and things, I believe them to be true.

Further affiant sayeth not.

This the 16 day of June, 1995.

/s/ Lesly Jean
Lesly Jean

FRANKLYN I. ROUSE
Notary Public, State of New York
No. 02R05034449
Qualified in Kings County
Commission Expires October 11, 1996

Sworn to and subscribed before me, this 16th day of June, 1995.

/s/ Franklyn I. Rouse
NOTARY PUBLIC

My Commission expires: Oct. 11, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WILMINGTON DIVISION
FILE NO.: 4:94-CV-62-H2

LESLY JEAN,
Plaintiff,

v.

DELMA COLLINS, Chief of Detectives of the City of Jacksonville, North Carolina, Individually, and JAMES SHINGLETON, Police Officer with the City of Jacksonville, North Carolina, Police Department, Individually,
Defendants.

AFFIDAVIT OF THOMASINE E. MOORE

I, Thomasine E. Moore, after first being duly sworn, depose, and say the following:

1. My name is Thomasine E. Moore and I am competent to make the statements contained herein based upon my personal knowledge.

2. I represented Mr. Lesly Jean in his criminal trial on rape and sexual assault charges in 1982. I believed then and still believe Mr. Jean was innocent.

3. I believe Mr. Jean was in the wrong place at the wrong time when he was first identified at the Dunkin Donuts.

4. Before trial, I served the attached discovery requests on the District Attorney's office and in particular then Assistant District Attorney Walter Wayne Vatcher. No documents were provided which gave any information whatsoever pertaining to the hypnosis of any witnesses, specifically Kathy Wilson or James Shingleton. It was not until during trial that we were advised of any hypnosis taking place at all. When Mr. Vatcher advised us of the hypnosis he did not provide us with or advise us of the existence of any documentation or recordings pertaining to the hypnosis of either individual or with respect to any prior misidentifications.

5. Although I do not recall a specific conversation with Mr. Vatcher, it is my understanding as well as that of my partner, Ernest J. Wright, that Walter Vatcher was never advised by Collins, Shingleton or any other law enforcement officer of any tape recordings or notes taken during the hypnosis of these witnesses. It is my recollection that Mr. Vatcher was as shocked as my partner and I were when we found out there were actual notes and tape recordings of these hypnosis sessions - information which only came to light well after Jean's trial.

Further affiant sayeth not.

/s/ Thomasine E. Moore
Thomasine E. Moore

STATE OF NORTH CAROLINA
COUNTY OF ONSLOW

Sworn to and subscribed before me, this 3rd day of July, 1995.

/s/ Gerri L. Johnson
NOTARY PUBLIC
My Commission expires: 9-16-98. [SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WILMINGTON DIVISION
FILE NO.: 4:94-CV-62-H2

LESLY JEAN,
Plaintiff

v.

DELMA COLLINS, Chief of Detectives of the City of Jacksonville, North Carolina, Individually, and JAMES SHINGLETON, Police Officer with the City of Jacksonville, North Carolina, Police Department, Individually,
Defendants.

AFFIDAVIT OF WALTER WAYNE VATCHER

NOW COMES, Walter Wayne Vatcher, after first being duly sworn, depose, and say the following:

1. My name is Walter Wayne Vatcher and from 1979 to 1984 I was an Assistant District Attorney for Onslow County, North Carolina.

2. In 1982, I prosecuted Mr. Lesly Jean on charges of first-degree rape and sexual assault.

3. I remember the case against Lesly Jean as an odd case from the beginning. The case was assigned to Detective Steve Smith who did not initially make an arrest. The morning of the rape there was a BOL for a person wearing dark shorts and crew socks and Officer Shingleton stopped a person based on this description who then fled into the woods. Several days later, Lesly Jean was brought in after Chief Halbert stopped at a Dunkin Donuts and observed a man who fit the description of the rapist. Halbert called Shingleton who arrived at Dunkin Donuts and identified Lesly Jean as the man whom he stopped and who fled into the woods. The officers took Jean to the police station where he was photographed and then released.

4. I remember that Kathy Wilson, the victim, did not pick Mr. Jean out of the first photo line up that included Jean's picture. I recall she returned to the police station the following day and commented that one of the pictures made her feel sick. She was shown a second photo line up and picked Jean's picture out as the one that made her feel sick. Then she later returned and picked Jean out of a line up as her assailant. Ms. Wilson was then adamant that Jean was her assailant.

5. I remember Jean consented to a search of his marine locker where the police found some tennis shorts and shoes.

6. At some point, the police took a voice recording from Jean and used it in an exemplar. Kathy Wilson eventually picked out Jean's voice.

7. At some point before the trial I went out to Jean's unit on Camp Lejeune to check the work log for Jean's unit for the date of the Wilson rape. I recall that the log sheet I needed for said date was missing.

8. I was aware at some point before the trial that Ms. Wilson had been hypnotized to gain a better description of the assailant. I was told by Delma Collins that nothing was gained from the hypnosis. I do not recall being made aware that the hypnosis was recorded nor that Captain Collins prepared Pre and Post Hypnosis Worksheet.

9. I did not disclose my knowledge of the hypnosis of Kathy Wilson to the Defendant prior to trial because the hypnosis seemed insignificant. I had been told by Captain Collins that the hypnosis did not materially increase her memory of the event and it did not help identify Jean. I do not recall being made aware that there were any records of the hypnosis. It was not until during the trial that I and the District Attorney felt we better disclose the fact of Ms. Wilson's hypnosis to the defense. This information was disclosed to the defense attorneys prior to the voir dire of Mrs. Wilson with regard to the identification issue.

10. I do. not recall learning of any recordings of the hypnosis sessions and never heard any tape from the hypnosis sessions of either Ms. Wilson or Officer Shingleton. I do not recall learning about and I did not receive nor did I review any Pre and Post Hypnosis Worksheets or other written records of the hypnosis sessions.

11. I was not aware, at any time prior to or during the prosecution of Lesly Jean, that Officer Shingleton's description of the suspect he identified changed substantially under hypnosis. I was aware that there were some changes in his description after hypnosis. I seem to recall that under hypnosis he no longer recalled any facial hair and his description of the shirt may have changed somewhat.

12. I was not made aware of any exculpatory information regarding the hypnosis sessions or any other matter. I do not recall being made aware of recordings and written records, that could have been used by defense counsel to impeach the testimony of the two identification witnesses, existed.

13. Had I been made aware that exculpatory information existed, I would have turned this information over to the defense as required by law.

Further affiant sayeth not.

This, the 12 day of July, 1995.
/s/ Walter Wayne Vatcher
Walter Wayne Vatcher

Sworn to and subscribed before me, this 12 day of July, 1995.

/s/ Loraine M. Carbone
NOTARY PUBLIC

My Commission expires: 12-15-99. [SEAL]

PUBLISHED*
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-6621

LESLY JEAN,

Petitioner - Appellant,

v.

NATHAN A. RICE, Warden;
LACY THORNBURG, Attorney General
of North Carolina,

Respondents - Appellees.

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raliegh.
Terrence W. Boyle, District Judge. (CA-87-3-HC)

Argued March 8, 1991
Decided May 22, 1991
Entered June 21, 1991
As Amended June 21, 1991
***Publication Ordered August 20, 1991**

Before WIDENER and SPROUSE, Circuit Judges, and WARD, Senior District Judge for the Middle District of North Carolina, sitting by designation.

Reversed and remanded by unpublished per curiam opinion.

COUNSEL:

ARGUED: Paul M. Green, NORTH CAROLINA PRISONER LEGAL SERVICES, INC., Raleigh, North Carolina, for Appellant. Richard Norwood League, Special Deputy Attorney. General, Raleigh, N.C., for Appellees. **ON BRIEF:** Lacy H. Thornberg, Attorney General of North Carolina, for Appellees.

PER CURIAM:

Defendant, Lesly Jean, was convicted of rape and sexual assault after trial by jury in North Carolina state court and sentenced to two consecutive life terms. After exhausting his state court appeals and post-conviction remedies, he filed a petition for a writ of habeas corpus in federal district court, contending that his conviction was based on the use of hypnotically enhanced testimony that violated his rights under the Sixth and Fourteenth Amendments and that the state failed to disclose the audio recordings and reports of the involved hypnosis, despite a specific request for such material, in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963). The district court denied the writ. We reverse.

I

In the early morning of July 21, 1982, Ms. Alice "Kathy" Wilson was raped and sexually assaulted. The incident occurred between 3:00 and 4:15 a.m. Ms. Wilson described her attacker as black, five feet eight inches tall, muscular, weighing about 165 or 170 pounds, with a close-cut marine haircut, kinky hair, and no facial hair. She added that he wore dark shorts, white crew socks and high-top sneakers. Ms. Wilson, however, acknowledged that she did not realize that her attacker was black until he told her.

Later that same morning, Officer James Shingleton stopped a man walking along the highway who fit the description of Wilson's assailant. He questioned the man for about one-and-one-half minutes, until the man fled into the neighboring woods. Shingleton did not get a good look at the suspect, as it was still nightfall and the only light available was from his police car's flashing blue lights. Shingleton described the person as a black male, possibly having a beard or mustache, close-cut hair, about five feet ten inches tall, 170 pounds, wearing blue shorts, a blue shirt with writing, white knee socks and white high-top tennis shoes.

The following morning, Ms. Wilson met with police officials to create a "composite" drawing of the suspect, which was subsequently reproduced and immediately circulated throughout the police station.[1] Police officials, however, decided not to reproduce a composite drawing based on Shingleton's description because the encounter had been too brief, the lighting too poor, and his description too vague.

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[1]At this meeting, Wilson added to her previous description that her attacker had small freckles scattered over his upper face, as well as a large spot somewhere on his left cheek, approximately the size of a dime.

Because of the shortcomings in Shingleton's description, Captain Collins, head of the Detective Division, hypnotized Shingleton on July 22, 1982. Collins' only training in this area had been a two-week course in investigative hypnosis at the North Carolina Justice Academy. During the hypnotic session, Shingleton's description of the man he stopped changed from his previous description. The design on the tee shirt became a sweat mark and the man was now clean-shaven. Shingleton also now remembered that the suspect had a baby-face, oval jaw, big lips, a big nose, glassy eyes[2] and that there were blue stripes on his socks, white shoelaces, and the word "Nike" written on the sneakers. Collins audio taped the actual hypnosis, but he did not tape the pre- and post-hypnotic conversations. He also did not record his own knowledge of the case, nor did he record Shingleton's pre- and post-hypnotic knowledge.[3] Afterward, Shingleton emphasized that he believed that the hypnosis greatly helped his memory and that he had actually "relived" the night in question. Investigating officers concluded that, as a result of the hypnosis, Shingleton's "description matches the one given by [the] victim."

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[2]Shingleton, however, stated during deposition testimony that he could not observe whether the suspect's eyes were glassy or clear. Further, one of the investigating officers stated that "both [witnesses] saw the man under conditions of extremely reduced light or extremely poor light, one being a color variation [Shingleton], the other being slight lighting [Wilson]. And the two tried to adjust what they saw based on what they believed."

[3]Shingleton could not recall whether or not he had seen the composite drawing created from Ms. Wilson's description prior to the hypnosis.

On July 26, 1982, two police officers spotted Jean at a Dunkin' Donuts restaurant, located near the victim's home. Believing that Jean matched the description of Wilson's assailant, the two officials detained Jean and radioed for Shingleton to come view him. Shingleton arrived, and positively identified Jean as the person he had stopped, stating, "that is the man." Jean was then taken into custody, photographed, fingerprinted and his marine locker searched - - all acts which Jean consented to. The search of Jean's locker uncovered a blue tee shirt, a blue pair of shorts with a white border and white stripes on each side, and a pair of white high-top basketball sneakers, with the Nike name and logo inscribed in black, and black laces in the sneakers. Shortly thereafter, Jean was released.

The next day, July 27, 1982, Ms. Wilson viewed a photo line-up, which included Jean's picture. She could not identify any of the subjects as her rapist. Ms. Wilson, however, returned to the police station the next day because one of the pictures made her "feel sick." She again viewed the photos and selected Jean's photo, saying that his was the face that made her feel sick. She also selected another photo, saying that the person in that photo looked "haunty." Wilson could not, however, make a positive identification of Jean as her assailant. During that same meeting, police showed Ms. Wilson the clothes that had been removed from Jean's locker, but she apparently did not recognize them. [4]

On July 30, 1982, Captain Collins hypnotized Ms. Wilson to "improve her memory of why [the] picture makes her sick." When Collins asked her if she had ever seen the person in the photo that made her ill, she replied that she did not know. He then asked if the picture and the rapist "looked the same? especially the eyes?, shape of face?" She

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[4]The investigating officer stated that had Wilson recognized the clothing, he would have indicated it in his report, which he did not.

replied "yes." [5]Again, Collins audio taped only the actual hypnosis, though this time he filled out a "Pre-Hypnosis Information Worksheet," briefly listing the characteristics of the assailant that the victim was able to describe at that time. After the hypnotic session, Collins filled out a "During

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[5]The parties dispute whether Wilson positively identified Jean's picture as her attacker during the hypnosis. The colloquy between Collins and Wilson went as follows:

> Collins: Now Kathy, you're going to go back to this photograph now. Let your mind travel back very easily and slowly to the photograph that you described earlier. The one photograph that causes you to be ill and I'm going to ask you to be very honest with me, you're safe and secure now. Have you ever seen the eyes in that photograph before? [Long pause] You're safe and secure Kathy. As a matter of fact I'm going to go even further now. You're safer than you've ever been. No harm can possibly ever come to you again. You're with friends. Now I want you to tell me--the face of the man in your bedroom [door slam] [is (?)] the same as the photograph that you are now looking at in your mind's eye, of the photograph that you saw when shown to you by Detective Smith ___, was it the same face?
>
> Wilson: [Wouldn't be surprised./Wouldn't be so __. (?)]
>
> Collins: Do the pictures appear to be the same? Especially the eyes? The shape of the face?
>
> Wilson: Yes.
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> Collins: Do you believe that the photograph and the man in your bedroom were one and the same? Be very honest with us. No body's [sic] going to hurt you any further.
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> Wilson: [They look the same (?)]

The question marks indicate where Wilson's answers cannot be discerned because of the very poor quality of the audiotape. However, the tape suggests that Ms. Wilson more strongly associated Jean as her rapist during the hypnosis than she had done at any time prior to hypnosis.

Hypnosis Information Worksheet," circling the items of "new information" as (1) a description of the assailant's eyes as grey, (2) possible Puerto Rican accent, (3) Nike emblem on his shoes, and (4) white shoelaces.

On August 3, 1982, the police made a voice exemplar tape, which included Jean's voice, along with four other voices--two with a northern United States accent, one with a Guamanian accent and the final one with a Puerto Rican accent. Jean, who was born in Haiti and spent part of his life there, has a Creole accent, which is a mixture of French and African dialects. Wilson stated that Jean's voice and the Puerto Rican voice sounded similar to the voice of her assailant, but she could not make a positive identification. One week later, Wilson telephoned the police and, without having listened to the tapes again, purported to identify Jean's voice as that of her assailant.

Six weeks later, on September 17, 1982, the police had Wilson view a three man line-up, which consisted of Jean and two other black men. One of the men was taller, the other shorter, than Jean. Neither possessed a military haircut and defendant's face is the only one which appeared in each photo identification as well as the live line-up. After viewing the line-up, Wilson positively identified Jean as her attacker.

In October 1982, Jean was indicted on charges of rape and sexual assault. Counsel for defendant filed a timely motion for discovery, which included the following request:

> To disclose the facts and circumstances surrounding any ... pre-trial identification ... at least sufficient to allow the defendant to determine whether to proceed under N.C.G.S. 15A-977 [governing motions to suppress evidence].

> To permit the defendant to inspect and copy ... mechanical or electronic recordings, tangible objects, or copies or portions thereof ... which are material to the preparation of his defense....
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> To provide ... results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case....

Despite this request, the state did not inform defense counsel that the victim may have identified Jean's photograph, that the two key witnesses had been hypnotized, or that various records pertaining to hypnosis and identification procedures existed. In fact, defense counsel did not learn of the hypnosis until after trial had already started, and after Ms. Wilson had already testified on direct examination.[6] After learning of the hypnosis, counsel requested any recordings that might exist--inexplicably the state still did not provide its records or tapes. Though defense counsel cross-examined both Ms. Wilson and Officer Shingleton on the possible effects of the hypnosis, he did not have the recordings to help contradict the witnesses' testimony or to demonstrate the pervasive procedural flaws in the hypnosis.

The state's evidence consisted of Jean's sneakers, shorts and tee shirt, a blood/semen test that placed him in the same 32% of the population as the rapist, and the

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[6]During the hearing on Jean's Motion for Appropriate Relief, Jean's trial counsel recounted how he learned of the hypnosis, stating: "[a]fter [Ms. Wilson] testified on the merits, there was some discussion between ourselves and the Assistant District Attorney about a statement as well as the fact that she had been hypnotized; and that's when I first found out; the case had started."

identification testimony of Wilson and Shingleton, who both identified Jean at trial, though Shingleton acknowledged that he could not be absolutely certain. In his own defense, Jean offered four alibi witnesses. Three marines testified that they awakened Jean in his bunk or saw him there at the time the victim was assaulted. The fourth witness, Jean's platoon commander, testified that Jean was required to be on duty at that time, and that if Jean had not been present there would have been a record of his absence, which there was not.

On December 5, 1982, the jury returned a guilty verdict on all four counts. The trial court sentenced Jean to two consecutive life terms in prison and the North Carolina Supreme Court affirmed the conviction. State v. Jean, 310 N.C. 157, 311 S.E.2d 266 (1984). After exhausting his state appeals and being denied post-conviction relief, Jean filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of North Carolina. Though the magistrate judge recommended that the writ should issue, the district court, conducting a de novo review, denied the writ. It is that judgment we review.

II

The dangers inherent in hypnotically enhanced testimony have been widely recognized.[7] In Rock v. Arkansas, 483 U.S. 44, 59-60 (1987), the Supreme Court stated:

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[7]In State v. Peoples, 319 S.E. 2D 177, 188 (N.C 1984), the North Carolina Supreme Court ruled that hypnotically refreshed testimony is inadmissible injudicial proceedings. However, the court in Peoples stated that the new rule would not apply retroactively to any case which had been finally determined on direct appeal or in which no appeal was taken from the trial court judgment. See id., 319 S.E.2d at 189. Thus, because Jean's state court appeal had been denied several months prior to the decision in Peoples, he could not avail himself of this change in the law.

> Three general characteristics of hypnosis may lead to the introduction of inaccurate memories: the subject becomes "suggestible" and may try to please the hypnotist with answers the subject thinks will be met with approval; the subject is likely to "confabulate," that is, to fill in details from the imagination in order to make an answer more coherent and complete; and, the subject experiences "memory hardening," which gives him great confidence in both true and false memories, making effective cross-examination more difficult.

The Supreme Court added that these dangers can be "reduced, although perhaps not eliminated, by the use of procedural safeguards." Id. at 60, 107 S.Ct. at 2713. In State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981), the New Jersey Supreme Court enumerated six procedural safeguards for hypnotic sessions.[8] The court stated that, first, the hypnotic session must be conducted by a psychiatrist or psychologist trained in the use of hypnosis. Second, the session must be independent of the police investigation, the prosecution and the defense. Third, the hypnotist's knowledge of the facts in the case should be recorded. Fourth, before hypnosis, the hypnotist should obtain a detailed description of the subject's current memory of the event. Fifth, the hypnosis session should be recorded--video taping is strongly recommended--so a permanent record

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[8]Although we have not adopted the Hurd guidelines as a "litmus test" for determining the reliability of pre-trial hypnosis, we have stated that they "certainly represent the type of general reliability inquiry that must be made" and that each of the six potential safeguards suggested in Hurd is relevant to the review of hypnotic procedures. McQueen v. Garrison, 814 F.2d 951, 958 (4th Cir.1987).

exists to ensure against suggestive procedures. Finally, only the hypnotist and the subject should be present during any phase of the hypnotic session, including the prehypnotic testing and the posthypnotic interview. Hurd, 432 A.2d at 96-97.

The district court found that the hypnosis conducted by Captain Collins "complied with none of these procedures," save the audio taping of the hypnosis, and that "there is no question that the procedures ... were inadequate and deficient." It concluded, however, that because the hypnosis was disclosed in adequate time for defense counsel to make use of it at trial, no constitutional violation occurred. The district court, though, did not sufficiently weigh the Brady consequences of the state's failure to provide the tape recordings and records. See Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963). In our view, the failure to furnish the requested evidence was constitutionally prejudicial. Brady, of course, held that the suppression of evidence "favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment...." Brady, 373 U.S. at 87, 83 S.Ct. at 1196-97. Evidence is "material" when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383 (1985).

Jean contends that the evidence concerning the hypnosis is material evidence under Brady. We agree.[9] Apart

[9]Impeachment evidence as well as exculpatory evidence, of course, falls within the principles of Brady. See Giglio v. United States, 405 U.S. 150, 154-55, 92 S.Ct. 763, 766 (1972).

from the identifications, there was little independent corroborating evidence to sustain Jean's conviction: there were no fingerprints or matching pubic hairs; the blood/semen test only placed Jean in the same 32% as the rapist; and the voice exemplar was of dubious quality, had only one black voice on it, and presented difficulty to Ms. Wilson, causing her to take one week to make her identification. Consequently, Jean's conviction rests substantially on the witness identifications, which makes disclosure of the recordings all the more critical. Had defense counsel had the audio recording and accompanying reports, it could have used that evidence to discredit the testimony of Ms. Wilson and Officer Shingleton. Despite Ms. Wilson's contention that the hypnosis had no effect on her, the audio recording suggests that it may have been during hypnosis that Ms. Wilson first identified Jean as her assailant.[10] Similarly, we think the audio tapes and accompanying records were material as evidence having strong potential for impeaching Shingleton's testimony. The stripe on the tee shirt that Shingleton thought he saw became a sweatmark under hypnosis. The mustache disappeared entirely. Under hypnosis, Shingleton recalled white shoelaces, but Jean's were black; he recalled striped socks, but Jean's were not; he recalled shorts with no stripes, but Jean's shorts had stripes and white trim; and he recalled glassy eyes, but in deposition testimony stated that he could not see the suspect's eyes clearly.

We are persuaded that the audio recordings and accompanying reports--twice requested--should have been disclosed to defense counsel, and that the government's failure to do so was a violation of the principles announced

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[10]The district court found that Ms. Wilson's illness at the sight of Jean's photograph was a "form of association that verges on an identification." We disagree.

in Brady and its progeny.[11] Accordingly, the judgment of the district court is reversed and the case remanded with instructions to issue the writ of habeas corpus. Unless the state elects to retry the defendant within a reasonable time, he should be released.

REVERSED AND REMANDED.

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[11]Because we reverse under the due process principles enunciated in Brady, we need not consider Jean's contention that the use of hypnotically refreshed testimony also violated his Sixth and Fourteenth Amendment rights.